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ROPERTY AND CONTRACT IN THEIR RELATIONS
TO THE DISTRIBUTION OF WEALTH

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PROPERTY AND CONTRACT

IN THEIR RELATIONS TO THE

DISTRIBUTION OF WEALTH

BY

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PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH

CHAPTER XIX

THE PRESENT AND FUTURE DEVELOPMENT OF PRIVATE PROPERTY (Concluded): THE UNIVERSALISATION AND THE SOCIALISATION OF PRIVATE PROPERTY

I. *The Universalisation of Private Property.*

We have seen the advantages of private property. Socialists frequently claim, however, that these advantages of private property simply emphasise the disadvantages of those who have no private property, making helpless dependents of the latter. It is conceivable that even if it is necessary that many people should be permanently without the advantages of private property, its advantages would nevertheless outweigh the disadvantages, even for the propertyless. But it is pertinent to ask the question, Can we not universalise private property and confer upon everyone the advantages of private property? Why should we not be able to universalise property as we have universalised education? While it is admittedly a more difficult undertaking, it is by no means hopeless, except in the case of the incompetent who form the sad "rubbish heap" of humanity; and it may be maintained that even they are better off on account of private property.

First of all we may consider the general measures for the universalisation of private property. Inasmuch as property is accumulated by production and by saving

all general measures for productive efficiency and self-control are helpful towards a wide diffusion of property. Among these measures we may mention everything that tends to the physical, moral, and mental uplift of the population. The benefits of physical training are illustrated by the advantages derived from training in the German army. It has been remarked that few of those who have gone through the army become dependent. The advantages of mental training are obvious; but the necessity of moral training for economic well-being has been too much overlooked. The whole trend of the present work should protect the author against the charge that he fails to appreciate the importance of social measures. While we recognise what can be done for the individual by the state and by society, we have at the same time to acknowledge that the prime cause of distress is individual and that social measures must, as John Stuart Mill long ago taught us, be judged by their effect upon the qualities of the individual. By cultivation and by a suitable social environment the individual can generally become a property owner.

We must also consider certain special measures which are helpful in the universalisation of property. As property is accumulated by production and by saving, all savings institutions for the masses are of the greatest importance. They should be provided with all possible safeguards, inasmuch as every failure of such an institution acts as a deterrent, especially for the weak-willed, who need every encouragement. We have then to consider under this head savings banks of all kinds. We must especially welcome the establishment of postal

savings banks in the United States, inasmuch as these institutions are perfectly secure and are found everywhere in our country as well as in most modern countries. School savings banks are especially to be emphasised, for there is little danger in our time of large expenditure and self-indulgence that thrift will be overemphasised. Building and loan institutions and a wise extension of insurance are to be recommended. With respect to insurance, we have only made a beginning in the United States. The author is pleased to be able to say that his own State, namely Wisconsin, has taken the lead in the United States in establishing state insurance.

Another measure which is under consideration in Wisconsin and in many other places is the development of a sound land policy, making it easy for men to acquire landed property. Probably we shall come very generally to government aid in acquiring land, the government improving the land, rendering it fit for settlement, and then selling it on the instalment plan. Germany and Ireland both afford us examples, and at the present moment the Board of Public Affairs in Wisconsin is working out plans of this general nature.

This is merely an outline which, in connection with other chapters in this book, shows that it is by no means Utopian to hope that private property, like education, may be universalised.

II. The Socialisation of Private Property.

We have already shown that the essential purpose of all private property is the general welfare. It is established and maintained for social purposes, and in

every country with a sound civilisation it fulfils these purposes increasingly. All property undergoes socialisation while it still remains private property. But in a peculiar and more restricted sense an ever increasing mass of private property undergoes socialisation.

If we think about the psychological processes by which altruism is developed, it will be seen that progress necessarily carries with it socialisation as a part of economic evolution. It has been shown that the *ego* and the *alter* grow and develop together. Self becomes conscious of self through its contacts and relationships with other selves. The play between the "I" and the "you" forms the major part of our thought and our feeling. Sympathy and altruism are as natural as egoism and individualism. Now this must show itself in our property relations; and as by social processes altruism grows and expands from localism to nationalism, internationalism, and cosmopolitanism, our private goods are consciously made more and more to minister to the needs of society.[1]

Wonderful, although little appreciated in our new and democratic world, is the process whereby the private property of sovereigns in monarchical countries, especially in Germany and England, has been socialised. This process seems to be irresistible, especially in regard to what was the private property of certain sovereign families. Indeed, in some cases their property can hardly be said to be any longer private. Even the palaces in which they live are quasi-public, and are made accessible to visitors from far and near, and their art treasures, though private property, are enjoyed by all,

either with nominal charge or entirely without cost. Indeed the private sleeping apartments and other living rooms of reigning families are often treated in their absence as if they belonged to public museums. The private parks surrounding the palaces, though often maintained at the sovereign's expense, are frequently opened to the general public for enjoyment, and the Tiergarten of Berlin, the private property of the Hohenzollern family, has become a real public park, the only private right reserved to the members of this family noticeable to the traveller being the exclusive privilege of going through the central arch of the gateway, the Brandenburger Tor, the outer drives and walks being open to the public.

Frequently it is difficult in the case of property of the Crown to tell what is private property and what is public property. Sometimes an attempt has been made in the case of ancient forests to assign certain parts to the monarch and certain parts to the state. Even after a prince gets his income he uses a great part for social purposes. A good monarch leads in the support of the fine arts and subscribes his name for a "princely" sum in cases of national disaster by fire and flood. He also leads in the maintenance of the opera and the theatre. Many private persons also in all the older countries open art collections to the public at frequent intervals. Feudal tenures, whatever their evils, have strengthened this feeling of stewardship and tend to the socialisation of private property.

Two illustrations of a fine spirit in socialisation have recently come under the notice of the writer. The first

is taken from Florence, Italy, where the Strozzi palace, by the term of the will of the late Prince Piero Strozzi, has become the property of the city and the nation. The document making this bequest illustrates to such a marked degree the feeling of social responsibility on the part of this Florentine nobleman that the writer feels justified in quoting from it:

"'A palace, such as the Strozzi palace,'" it says, "'with which are connected so many historic traditions, I have always thought cannot be considered as ordinary private property. It should not be disposed of as one disposes of an ordinary dwelling or of a park. The history of the city of Florence and the inhabitants of the city of Florence have over its monuments rights which I intend to respect and protect.'" [2]

The second illustration, from England, relates to Warwick Castle. In her *Warwick Castle and its Earls* the present Countess of Warwick expresses very clearly this view of property:

"We have tried—both Lord Warwick and myself—to adapt the ancient Castle to the needs of the present day, to blend the old and the new, and, while continuing its historic traditions, to make the Castle the centre of many movements for the benefit of others—not only those among whom our immediate lot is cast, but the nation at large. For Warwick Castle is a national glory as well as a personal possession, and we, who hold it now, strive to fulfil, imperfectly it may be, the duties of our stewardship and the privileges of our heritage." [3]

This same process can be seen in the new world, but with us it is not so highly developed. Our very wealthy people give largely for benevolent purposes, but do not

so extensively use their private possessions for direct and immediate public uses.[4] The feeling of equality, the general democracy of our new world, is not so well calculated to emphasise *noblesse oblige*, and there is less consciousness of what goes with a position of privilege. And our new world democracy has still to find appropriate forms for the expression of some of the finer fruits of a rich civilisation. Apart from this, many of the finest fruits of civilisations are ripened only by time, and time will do its work in what are now new civilisations; in growing socialisation we shall see increasing justification of private property.[5]

[1] P. 478. On this dual process whereby egoism and altruism are developed together see Ely, *Evolution of Industrial Society*, Pt. II, Chap. XII, on "The Widening and Deepening Range of Ethical Obligation," and in the same book, Chap. XIII on "Social and Ethical Interpretation"; but especially the book bearing this title by James Mark Baldwin, of which the above mentioned Chap. XIII is primarily a review.

[2] P. 480. For a description of this bequest see *Chicago Daily Tribune*, July 31, 1912.

[3] P. 480. *Warwick Castle and Its Earls*, Vol. II, p. 818. Chatsworth, one of the finest places in England, is the seat of the Duke of Devonshire who pays taxes on it as on any other private property but frequently opens it to the general public, as if it were a museum and gallery. Many thousands yearly visit Chatsworth.

Compare the following taken from "American Notes in Munich," issue for April and June, 1913:

"I love to go out to Nymphenburg, as do all good Munich people. What was built as a retreat for royalty has been invaded by the common people and they swarm through its park and grounds in throngs every sunny day. It has been open to the public so long that now they claim it for their own and no king could have the temerity to close it."

It has been estimated that the value of objects of art belonging to the royal Wittelsbach family which are now in various galleries and museums of Munich have a value of one thousand two million marks, while Ludwig I of Bavaria, who reigned from 1825 to 1848, spent over thirty million marks of his own for the beautification of Munich and for works of art. And the Wittelsbachs are not regarded as a wealthy family. On the activity of Ludwig I, see *Unser Bayerland* by Denk and Weiss, pp. 510–520.

[4] P. 481. In this connection one naturally thinks of the gospel of wealth as emphasised by Mr. Andrew Carnegie, in respect to which the following extracts are given:

"By using his surplus for the good of the community the man of

affairs exalts and hallows his calling. It is only by considering the enormous sums, which under present conditions must sometimes be concentrated in one hand, as a sacred trust to be administered during one's life for the public good, that successful business men can hold their heads up, and console themselves with the thought that in usefulness to their fellows they can rank even with the noblest members of the professions." (Cunningham, *A Busy Week* [1899] p. 33.)

"The day is not far distant when the man who dies leaving behind him millions of available wealth, which was free for him to administer during life, will pass away 'unwept, unhonoured, and unsung,' no matter to what uses he leaves the dross which he cannot take with him. . . . Of such as these the public verdict will then be: 'The man who dies rich dies disgraced.'" (Carnegie, *The Gospel of Wealth* [1889], Pt. I, p. 17).

[5] P. 481. But the question may be raised, Have we not gone too far in many American cities, when we have removed fences and hedges and have no divisions between the yards and lawns of adjoining houses. The thought is a good one and parts of such a city as Rochester, New York, where attractive houses are set down in a great park, as it were, are beautiful to look upon. The movement for the removal of fences in residential districts of American cities may be looked upon as a socialisation of private property. But does it not beget a disrespect of private property which is after all injurious to society as a whole? One sees paths made across the private grounds of good-natured proprietors and continual abuse by the public of their privilege to enjoy by sight the beauties of private parks. The visible sign and symbol of private property is frequently desirable. The private person must have his private sphere of action. High walls, on the other hand, which make streets like passages through a canyon, go to the other extreme.

CHAPTER XX

THE TRANSFORMATION OF: I. PUBLIC PROPERTY INTO PRIVATE PROPERTY. II. PRIVATE PROPERTY INTO PUBLIC PROPERTY [1]

Under the second head we discuss the right of eminent domain or expropriation. We use the word expropriation because the right of eminent domain seems to imply a certain theory in regard to expropriation. The general term expropriation would mean taking property away from individuals. We in the United States are inclined to rest the right of expropriation upon eminent domain, the overlordship of the state; but in Germany the contrary is true, and the idea of eminent domain is questioned by some jurists. Expropriation means taking property away compulsorily (*Zwangsenteignung*). We may, then, use the general term expropriation and avoid the implication of any special theory of overlordship, such as is implied in the use of the term estate in English law, as was pointed out in contrasting property and estate.

The economic literature of expropriation, as distinguished from the juristic literature, is extremely limited. Very few economists have understood its significance in economic philosophy, or appreciated its importance as an economic subject, and no one of them

has given it exhaustive treatment in its economic aspects.[2]

We are now considering the transformation, first, of public property into private property, and secondly, of private property into public property. The transformation of public property into private property is easy. In modern society until recently the pressure has been chiefly in that direction. And in a country like the United States, where the pressure is so tremendous, the checks are distinctly insufficient, and there is great need of making it more difficult to effect this transformation. We may use the public domain as an illustration of the excessive readiness to get rid of landed property on the part of States and cities as well as by the federal government.[3] We do not necessarily imply that we should not have parted with the public domain, but certainly there is an undue readiness to part with it without adequate consideration of terms and conditions. We see the same tendency in parting with charters and privileges of economic value. While these may not be property in the strict sense, they are at any rate potential public property, for through them public property could be accumulated; and they may thus be put under the same head.

When we have once decided to make public property private property, shall we effect the transformation with or without compensation? That is, should the private person who acquires public property pay for it? The rule should be compensation. The transformation of public property into private property without compensation should be something exceptional and

should always have some special reason, for the one who receives property without compensation is favoured with rights or priviliges of economic value at the expense of the rest of the community. And why should privileges be given to him rather than to me or to some third person? Why should we take the property and hand it over to some private individual who gives us no return? There may be some special reason. The Homestead Act which transfers property in this way without pecuniary compensation furnishes us with such a reason. It is held that the one who develops the country makes a return for the property. This is the view we have taken in the past. Here a good reason is advanced, and so everyone who desires may receive 160 acres of the public domain on consideration that he makes it a home. At the present time, however, these old reasons do not hold, because we have not valuable land of sufficient area to give everyone a home. So the one who receives as a gift 160 acres of good land appears to be a favoured person. Anyone who knows anything about it, knows what a scramble there was in Oklahoma[4] and elsewhere in recent years whenever the United States has had good public land to be disposed of gratuitously; and this scramble brings out the fact that favouritism exists in such cases. We have a race, literally, for the desirable locations.

The general rule is that full compensation should be given. Suppose it is a poor but worthy man who succeeds in the race for a homestead. There are others who cannot be favoured, and justice would require that the one who received public property should pay for it.

Very frequently a corporation brings forward the argument that because others have received rights and privileges of economic value without payment, it also should receive them. The friends of the corporation say, "Treat all alike." But the fallacy of this is so obvious that we need not dwell upon it. Corporation B comes forward and wants a valuable street car franchise without payment. Corporation A has received such a franchise, and why should not B? We have to deal not with these two only, but with the community as a whole, and because property which belongs to the community as a whole has been given over to a privileged few, there is no reason why this line of action should be continued, but there is every reason why it should be stopped as soon as possible.

Let us pass on to consider the transformation of private property into public property, either with or without compulsion. Frequently we do not have compulsion. Property is purchased in the open market and becomes public property. This case presents little theoretical or practical difficulty where we have honest administrators, and there are many cases where a purchase in open market is quite sufficient. All that we need say in such a case is that those who have charge of the public interests, when it is desired to transfer private property into public property, should go into the open market and exercise the best judgment and skill, not paying more than private persons would pay. Here again we may have favouritism shown to the few at the expense of the many. But this by no means signifies that the purchaser for the public should buy at the cheapest

possible price, and to compel him to do so frequently involves waste and sometimes wrong. Like a private person he should have reference to quality and at times may take into account conditions under which production is carried on. The government, for example, in purchasing uniforms for soldiers should not encourage "sweating" in the clothing trades.

What especially interests us, theoretically as well as practically, is what we call eminent domain or expropriation, the compulsory seizing of private property in order to make it public property. The American and English legal views hold eminent domain to be a seizing of private property for the general good. It may not be for the purpose of making it public property, but it is for the purpose of advancing the general welfare. The power to take any property for the general welfare is held to lie dormant in the state. In an early—and well considered—case, the Supreme Court of North Carolina says:

"The right of the public to private property, to the extent that the use of it is needful and advantageous to the public, must, we think, be universally acknowledged. Writers upon the laws of nature and of nations treat it as a right inherent in society. There may indeed be abuses of the power, either in taking property without a just equivalent, or in taking it for a purpose really not needful or beneficial to a community; but when the use is in truth a public one, when it is of a nature calculated to promote the general welfare, or is necessary to the common convenience, and the public is in fact to have the enjoyment of the property or of an easement in it, it cannot be denied that the power to have things before appropriated to individuals again dedicated to the serv-

ices of the state is a power useful and necessary to every body politic. Theoretical writers have derived it from the original and full property, in its highest sense, existing in the community or sovereignty of the state before any division among individuals, and they deem the right of resumption for common use to be tacitly reserved by implied agreement. Thus derived, the power has the sanction of compact, which probably is the motive for tracing it to this source, as constituting a sanction founded in morals and nature. But, practically, it is immaterial whether the right be supposed to have been impliedly reserved because it ought not to be granted, or because it is a portion of the national sovereignty which is inalienable by the government, or whether the right is created by public necessity . . . its existence in every state is indispensable and incontestable."[5]

It is to be observed that easements as well as lands are included under the power of eminent domain. This is shown in the following quotation taken from Lewis's *Eminent Domain:*

"Land and all estates, rights, interests and easements in, or appurtenant thereto, may be taken under the power of eminent domain." [6]

The *Cyclopædia of Law and Procedure* gives the following as showing the scope of eminent domain:

"The term 'real estate,' as used in reference to the right of eminent domain, includes and covers all incorporeal hereditaments, easements, rights, and privileges necessary to the construction and operation of the works for which the land is condemned." [7]

The scope is further emphasised in the opinion of Mr. Justice Holmes in the case of Ladd *v.* City of Boston in 1890. The owners of lots bounding on Pemberton

Square in Boston mutually agreed, among other things, that portions of some of the lots should not be built upon, at least not above a certain height; and afterwards the city took such lots for a site for the new court house. It was held that easements of light, air, and prospect were created by the covenant and that the city was liable in damages for their extinguishment. Mr. Justice Holmes, in delivering the opinion, stated:

"The right to have land not built upon, for the benefit of the light, air, etc., of neighboring land, may be made an easement, within reasonable limits, by deed."[8]

The chief limitation of eminent domain as it exists in the United States is found in the concept "public" in public purpose; and when obstacles to a sufficiently wide scope of eminent domain are encountered, these may be traced back to a narrow view of public purpose.

Generally expropriation has been confined to real estate, but property in railways, water, dikes, mines, would come under this term in our own and other countries. When we come, however, to the transfer of property during a transition from one economic period to another, we find that expropriation has had a wider range and that rights have been expropriated in one way or another. For example, when we passed over from feudalism to modern industrialism, a great many rights were done away with, either with or without compensation. That was true in regard to serfdom. The old rights of the lords, the serf owners, were abolished in Russia with some compensation. It is generally held that the compensation was not a full one. The

same is true with regard to slavery. This shows that in expropriation we have to go beyond real estate in order to accomplish economic purposes. Moreover, we cannot, as Stahl does, limit expropriation to public necessity as distinguished from public utility. What do we mean by necessity, and what do we mean by utility? We have simply different degrees of utility. Perhaps it can scarcely be said that there is any absolute necessity that any right of expropriation should be exercised. We could have lived without railways, but we could not have had them without exercising the right of expropriation. And as we could have lived without railways, how can we say that it was absolutely a case of necessity? We have only varying degrees of utility. We may say, however, in a general way, that it is highly useful, and in that case a necessity of sovereignty, that the right of expropriation should receive recognition. Its purpose is the preservation of sovereignty and of the general welfare. Manifestly it is not desirable to use force in making purchases if it can be avoided. And it can be avoided in many cases. The government can go into the open market and purchase what is sold at a competitive price. But even in time of peace, it is necessary to exercise caution in order to see that the government is not taken advantage of; and often in times of war the right of expropriation may have to be exercised and compulsion used in fixing the price. What are the exceptions to this rule that the government can purchase in the open market without compulsion? In early times the chief exception comes under the head of real estate. Doubtless that is the

reason that the law looking back upon the past and founded upon precedent is inclined to restrict expropriation to real estate.

Some public purpose must be manifest in order to justify expropriation, but we cannot narrowly interpret public purposes, if we have in mind the economic purposes for which expropriation exists. Sometimes our courts have been inclined to interpret too narrowly the right of expropriation, and they have made distinctions which do not rest upon any sound basis of reasoning. The chief error is found in unreal distinctions between what is and what is not a public purpose; this is due to a belated individualism lingering on after the economic conditions which gave it a relative justification have long ceased to exist. More will be said about this later.

It is time now for a definition of expropriation, and the author quotes Wagner's definition with the statement he makes, and also a statement of Professor von Ihering concerning expropriation. Wagner's definition is,—"*The right of expropriation is the right of the state to seize a specific object of property without the consent of the owner in order to employ it in a manner demanded by the public interest; or to limit the property right of the proprietor in order to place a servitude* (*easement*) *upon it; or to take the use of it in the public interest.*" [9] His statement in this connection is that "the proper economic and socio-political conception of expropriation regards it as the legal institution by means of which, when free contract fails, changes are compulsorily brought about in the division and ownership of specific pieces of capital

and land among the various economic units (*Verteilung der individuellen Kapitalien und Grundstücke*), especially between compulsory public economies on the one hand and private economies on the other, and then among these last named with respect to one another, in order that there may be such a division and ownership of land and capital as the development of national life requires." [10]

We now comment upon some of these points: "The proper economic and socio-political conception of expropriation regards it as a legal institution by means of which, when free contract fails, changes are compulsorily brought about," etc. That is to say, this is a conception which is appropriate to economics and to social politics and it looks upon expropriation as a legal institution by means of which certain changes are brought about when free contract fails. Now what do we mean by "free contract" and when does that fail? We could say in one sense that free contract need not fail at all. Let us suppose we have a piece of property that is worth in the open market say $10,000, and the city wants to buy it of the owner, who will not sell it for $10,000, $15,000 or $20,000, but only for $200,000, although it is worth but $10,000. Now shall the city pay $10,000 instead of exercising the right of expropriation? We say, "No." The price to be paid, rather than to resort to condemnation, is a matter concerning which judgment must be exercised at the particular time or place. One might say that where there was not a manifest intention to defraud the government it would be better to pay $100 or $500 extra rather than to exercise

the right of eminent domain. We seek justice and in doing so we frequently come against a grasping disposition on the part of private interests.

Changes are brought about in the division and ownership of property among the various economic units, that is, among various persons. The units in economic society are natural and artificial persons, individuals, cities, etc., and this conception regards expropriation as a legal institution for use especially when it is desirable to bring about changes between compulsory public economies (political units, nation, state, city, etc.), on the one hand and private economies on the other. We must make this distinction, and we must also admit that sometimes it is necessary to exercise this right of eminent domain or expropriation in order to bring about a different distribution among various private persons. That was the case in the abolition of feudalism. There was then a different distribution of the rights of property effected among private units. So we do not have to deal simply with changes between political units on one hand and private units on the other, but with changes among the private units themselves.[11] The purpose is that there may be such a division and ownership of land and capital as is required by the development of national life. The idea is growth, natural evolution, and these changes cannot be brought about in all cases by voluntary methods; consequently compulsion has resulted and is the lesser of two evils. Otherwise we would have the whole suffering for the sake of the few and we cannot consider that to be just. "The right of expropriation is the right of the State to

seize a specific object of property without the consent of the owner *in order to employ it in a manner demanded by the public interest.*" We have to consider it also as a right "to limit the property right of the proprietor in order to place a servitude upon it."

But cases may also arise when expropriation is needed to take away an easement and to do so in the interest of the general public. A good example of the expropriation of an easement is the payment of damages for the loss of light on account of construction of an elevated road. Easements frequently have to be expropriated in connection with the abolition of railway level crossings. The right of the owners of a large mail order house on Michigan Avenue, Chicago, to an unobstructed view of Lake Michigan was an easement with respect to public property on the other side of the avenue where the city desired to locate a library building. Supposing this to be really in the public interest, it affords illustration of a case where what is needed is the expropriation of an easement in the public interest.

We have in what has been said an explanation of the legal idea of expropriation. We must so look upon it as "the right to limit the property right of the proprietor so as to place a servitude or easement upon it." If a right of way is established over private property, it is expropriation of part of the property right of the proprietor, and he also regards it as expropriation when the use of the property is taken in the public interest. We have here an explanation of the idea of expropriation which fits inwith the purposes of economic development;

and there is no doubt that the legal idea will follow the line of economic development more or less slowly, as is always the case.

Another statement by the late Professor von Ihering, quoted by Wagner, is as follows: "The true significance of expropriation is in my opinion fully misconceived when it is regarded as something which cuts into the idea of property (*Eingriff in das Eigentum*), an abnormity which is opposed to that idea. It can appear thus only to that one who looks at property simply from the standpoint of the individual. (Individualistic theory of property.) This point of view, however, is as false for property as it is for contract. The only right point of view is the social, and from this point of view expropriation is so far from appearing as an abnormity, a contradiction to the idea of property, that we must regard it as something absolutely required by the idea of property. Expropriation contains the solution of the task of reconciling the interests of society with those of the individual. It makes property a practical institution fit to survive. Without expropriation property would become a curse of society." [12] The idea of expropriation then, as already stated, is in harmony with the idea of social evolution. It is part and parcel of the evolution of law and one reason why it is not better treated in the law books is because the idea of the evolution of law has so slowly made its way among legal authorities that many men of legal learning have not yet fully grasped it. Social evolution shows the necessity of this idea of expropriation and shows also the changing range of its operation. At the time when we had no natural monop-

olies it could rarely be necessary to extend the idea of expropriation to franchises; but the same grounds which led to its use for real estate will lead to its extension to franchises. And in this connection it is interesting to observe that through statute law in New York State, public utility franchises have come to be clearly recognised as real estate.[13]

Expropriation is out of harmony with the absolute idea of property. Expropriation makes the interest of the individual conform to the social interest, to the growth and evolution of the ethical ends of society. It is, to use Wagner's expressive phrase, a "postulate of the social coexistence of individuals." [14] We cannot then establish any definite limit, but every age has its own needs of expropriation brought about by changes in the organisation of the national economy and by changes desired in individual productive processes.[15] It still holds true that the chief use and requirement of expropriation is in land sales because it is in these chiefly but not exclusively that we need to exercise compulsion. We have already pointed out the needs which arose from the change from feudalism into modern industrialism. The Reformation also had its needs, when there was a change from one religious order to another. When the idea concerning the ownership of property by religious bodies changed we had again need of expropriation. And in the case of the land of the Friars in the Philippines, if the owners had been unwilling to sell for a reasonable compensation, expropriation might have been desirable. The passage from slavery to freedom has frequently involved expropriation, and it is

in that way alone that the change can be brought about in such a manner as to secure the greatest gain with the least harm. Otherwise we would have social convulsion as in the United States, and we have not reached the end of the evils of the change without recompense from slavery to freedom.

Then, also, the considerations which are brought before us in connection with the dead hand show the need of expropriation, the need of secularising, as it is called, the property of religious bodies. We cannot tell how far it may be necessary in the future to exercise this right, or rather to extend this right which has been exercised in the past, for there are evidences that such extension will be necessary. Especially in modern times do we need to exercise this right in respect to means of communication and transport in order to bring them into conformity with social needs.

Regarding the limits of expropriation, Wagner makes the following statement.[16] We cannot find the limits of expropriation "in the general welfare or public interest," because the idea of the public interest is something which is as devoid of precise bounds as the absolute idea of property; but the limits of expropriation are found arising out of the needs for essentially changed conditions in the organisation of the national economy or industry; as we pass from one industrial period to another expropriation becomes necessary, as in the case of the change from feudalism. In the second place, it finds its limits in the changes and transformations regarded as desirable in individual production,—the productive processes of individual industrial econo-

mies. (*Umgestaltung des einzelwirtschaftlichen Produktionsbetriebes.*)

Professor Wagner proposes, however, to find the limits of expropriation in two conditions or circumstances, or perhaps in two kinds or classes of circumstances: first, in the needs which arise out of the national industry as when we pass from one stage of industrial evolution to another; and secondly, in the changes and transformations in the individual economic unit or in the production of the individual economic unit; in the changes, in the productive processes of the individual establishment, if we may use that term.

As we came out of the Middle Ages, the purpose of the changes was to free the individual economic unit from trammels of the past,—expropriation was for the accomplishment of timely economic individualism. Now and in the immediate future, expropriation has in view largely the extension of the coöperative economic system, especially the compulsory or public coöperative system of production. We have to do here, in the extension of the public system of production, with arrangements which tend to diminish the natural cost or the sacrifice of production, with arrangements which seek to improve the condition of those immediately engaged in production, especially of the wage-earners. We have to do with arrangements and contrivances diminishing the sacrifices which the worker incurs in productive processes, regulating the length of the working day, or aiming to bring about a better distribution of wealth; improvement in the industrial, spiritual,

and ethical life of the population. The need for these changes arises in part from a denser population and more intensive national life.

The author cannot agree with Wagner when he says that we cannot find the limits of expropriation in the general welfare or public interest. These limits are surely found in the general welfare and the public interest; those circumstances which limit expropriation simply define what we must regard as the general welfare or the public interest. General welfare, to be sure, is indefinite and we have to decide what it is at particular times and places, but we have to operate in society continually with concepts just as general and vague as this, which we have to define as best we can at any particular time and place. Expropriation, however, has been needed in the past and is needed in the present, because without excessive social sacrifice we cannot otherwise bring about the changes desired in the ownership of property. Sometimes it can be done without expropriation and generally there is reluctance to resort to expropriation. There was some talk about compulsory expropriation in Prussia at the time the privately owned railways were acquired by the state. It was not necessary, however, but purchase was brought about under a certain pressure. The owners of the property understood very well that if they did not sell at what was regarded as a fair price they would suffer worse things. Either expropriation would be resorted to or the system of railways which the Prussian state already owned would be extended and they would be given a sort of competition which they would not like.

Expropriation can be required in the case of mines, and it has often been suggested that there may be need of such a movement with us on account of the relations which exist between mine owners and the general public on one hand and the mine owners and their wage-earners on the other. It has also been proposed that expropriation should be used in the acquisition of new zones of land about cities, in order that the city itself may extend its area. The increasing development of a public social conscience suggests and will bring about new fields within which expropriation must be used. Especially must it be used in the abolition of those forms of property which are offensive to the general conscience. Quite a different question is that of compensation which we shall consider. When any form of property, for instance, slaves or saloons, offends the conscience of the people it may be necessary to abolish that form of property through expropriation.

Recent extensions of the right of eminent domain have been found essential for municipal improvement. Nor can this right, without public injury, be restricted to cases in which the property purchased is to be put to a different use. This idea of a different use, if narrowly interpreted, would prevent the exercise of the right of eminent domain to purchase houses and then let them, or to buy building lots and then to sell them later as building lots. Yet this is needed in the public interest. It facilitates improvements and gives to private property a flexibility which tends to its conservation. An illustration is afforded by the case of Rio de Janeiro as described by Dr. L. S. Rowe.[17] In speaking of the plans

of Dr. Passos, the prefect for the improvement of Rio de Janeiro, Dr. Rowe says:

"In order to carry out his plans, the prefect had to overcome many traditional prejudices, overthrow many accepted principles, and disturb many acquired rights. But with a singleness of purpose which disarmed all petty criticism, he continued to carry on the work of regeneration."

Later on in this article, he speaks about the construction of an avenue 120 feet wide through the most important business sections of the city. This avenue "cut through a network of narrow, ill-smelling streets, and involved the destruction of a large number of insanitary dwellings."

"Although intended primarily for commercial purposes, the construction of the Avenida Central constitutes a great sanitary improvement and has enhanced the artistic beauty of the city. Exercising its right of eminent domain for the construction of the avenue, the government appropriated territory sufficient to secure the building lots on either side of the new highway; adopting in this respect the plan of the French government in constructing the Avenue de l'Opéra in Paris. The ownership of these lots enabled the government to accomplish a two-fold purpose; first, to make the sale of these lots contribute a large amount to the expense of the avenue, and secondly, to control the general architectural design of the new buildings. In order to preserve the street perspective, the purchasers of lots along the avenue were compelled to observe certain general rules in the construction of façades, and to submit all architectural designs to the approval of a certain Commission. The result has been that the beauty of the avenue has been greatly increased by the harmony of design of the newly constructed business houses."

Many other concrete illustrations could be afforded.

Our legislative bodies and courts must re-define and enlarge their conception of public purpose in accordance with the needs of our own stage of economic evolution.

We then take up the question whether when we transform private property into public property in this way it should be with or without compensation. The question of compensation does not enter into the purchase when the sales are voluntarily effected by private individuals, because if they are really voluntary then the one who makes the sale must receive what he regards as an equivalent. Henry George has advanced against compensation for land an argument which is based upon a doctrine of natural rights, rights which existed prior to the social organisation, rights which spring out of what is most fundamental in human nature, the right to life and to the conditions of life. In Lassalle's work on *Acquired Rights* [18] we find a different and more general argument for expropriation without compensation. There is in every contract, he says, and underlying every legal institution a silent clause, something which is understood but not expressed, *viz.*, that it holds good until it is disapproved by the social conscience. But when the social conscience disapproves an institution or the property right which is implied in it, then the institution or right ceases to exist; then any rights acquired become null and void. He uses the case of slavery to illustrate this; that all contracts which implied slavery were valid so long as they were approved by the social conscience; but when the social conscience rebelled against slavery and demanded its abolition, then all

contracts based upon slavery and all laws which implied slavery had no longer any force.

What shall we say in regard to these arguments? First of all, we do not recognise this line of argument based upon natural rights. It is difficult to tell what we can recognise as natural rights. Generally the term natural rights simply carries with it what Jeremy Bentham calls dogmatism in disguise. As has been so well said, it presents no argument for the position taken but sets up the position taken as its own reason. You say, this appeals to you on the ground of natural rights; I say it does not appeal to me; you have simply your position over against my position. Rights are acquired in and through society; we have to do with social rights, and the true test must be utilitarianism in the highest sense. The author for his part has never seen any argument which so far as he could see goes beyond that. When we take the question of what is really useful in the long run, have we any argument for the abolition of property or for the expropriation of property without compensation? The economic and social purpose of expropriation is the fluidity of property. It is to give property that form and shape which may be needed at any particular period in social development, to subordinate the rights of the individual to those of society. That does require changes in the form of property, in capital and land. It does not require that a change should be effected without compensation. But if we take the position of natural rights do we have to look at it differently? We ask, What is right? Who is secure on the basis of abstract right? A certain property institution is established by

society, and let us admit, unfortunately. Now that the mistake has been made in the establishment of this kind of property, society as a whole, every member of it, participates in the guilt; expropriation without compensation implies that we select certain members of society to bear the entire sacrifice or burden of a changed division in the distribution of property among the various social units. Then we have to consider the convulsions which result from changes without compensation, from taking away the property rights of a certain class. Not according to any general rule, but arbitrarily, those who have property interests of a certain sort are, it is held by advocates of certain natural rights theories, to be deprived of their property. This is no general measure which acts upon all alike. It does not take away property from the unworthy and bestow it upon the worthy, but it affects the good and the bad, the strong and the weak alike; in many cases it would be likely to put a burden especially upon the weak.

But it may be asked, How are we going to effect these changes? Where are we going to get the money for compensation? There can be no insuperable difficulty about that under a satisfactory system of taxation. If the change in the form of property is really beneficial there is in the long run no loss to society as a whole; quite the contrary, for otherwise we have no valid ground for expropriation. But we have to see to it that any temporary burden is distributed justly throughout society as a whole and this has to be brought about by some general scheme of taxation. If the question arises, Shall we nationalise the railways? and an affirmative

answer is given, it must be that it is socially beneficial. Now if it is socially beneficial, after the railways are nationalised, society as a whole is no poorer than before, but on the contrary must be really richer. Otherwise the argument in favour of the measure is not valid. If society is richer than before, where is the social burden? At most it is simply a temporary burden, an attendant difficulty at first, which can be distributed. Then we have compensation afforded to those who are expropriated through the scheme of taxation, and it is especially inheritance taxation which is to be recommended for great changes of the kind under consideration. Let us suppose, for example, that the time should come when it would be desirable to expropriate land from private owners,—say urban land or any great class of land. The money then could be raised by a general scheme of inheritance taxation, the justice of which is obvious, because in an inheritance tax we take from those who have acquired great sums of money, and we are most likely to take from those who have shared to the greatest extent in surplus values, for it is through surplus value chiefly that the great fortunes have been acquired which would be especially affected by such taxation. We would have no real suffering if the scheme of taxation were well elaborated. We would diminish some private fortunes, but society as a whole would be not poorer but richer, and there would be a greater amount of real opportunity for enjoyment than there now is.

Is this clear,—That there can never be any obstacle in the way of a desirable change of this sort? When we once admit that any change is desirable it is only a ques-

tion of the distribution of the burden of the change. If it is desirable that a change should be made, society is richer after the change than it was before.[19] Otherwise it is not a desirable change. Then we have to see that this greater welfare of society is not acquired at the expense of some one class.

Still another question remains to be considered in the case of railways, telegraph companies, etc. We have to consider whether we shall give a return in cases of expropriation for what has been actually invested or whether the market value shall be paid. The same line of argument which we have adduced would lead us to deal liberally with those expropriated. Let us take as an example the Western Union Telegraph Company. If, as has frequently been maintained, it is overcapitalised, how did this come about? It came about through attempted competition which proved a failure because of methods which were not adapted to the business. Now who must bear the responsibility for the large number of companies, which in the general interest have been bought out by the Western Union? In buying out these companies the Western Union did what was for the interest of society as a whole, because thereby the company reduced the actual cost of this business, even if not always of charges for the service. But is society as a whole responsible for this excessive competition, for the large number of telegraph companies bought out, and to that extent for the large capitalisation? At any rate, society is chiefly responsible for it. It may be that the whole attempted competition was the result of erroneous notions concerning competition

and the proper field of competition. If so, then society as a whole ought to suffer for its ignorance and not simply those who at the time happened to be owners of Western Union stock.

We might apply this argument generally with respect to railways, but we must not push it too far. At certain times when compulsory purchase or expropriation is talked about we may see an artificial inflation of capitalisation. Those in the business who have charge of this particular sort of property purposely, may, in order to acquire an excessive return for their property, increase its nominal value and may increase the capitalisation for which those engaged in the business are responsible. It is said that if a city attempts to purchase a gas plant or street railway, the owners see to it that at the time the purchase is to be made the bonds and stock are quoted at a high price. This is quite different from the valuation of which we are speaking. We are talking about a valuation which is real, which is actual, which is proved by the earning capacity of the business. Sometimes this is found out by reviewing the history of the business for a series of years, perhaps for five years.

It must also be said, that when there is a plainly reserved right to re-purchase then it is not clear why society should not make use of that right. This was for many years the case with the Boston and Albany Railroad.[20] The right was reserved to purchase by payment of par value and 10 per cent. on the actual investment, but the dividends had been more than that, so if the reserved right had been exercised, it would have been necessary only to pay par value for the stock. In

such a case no reason is apparent why this right should not be utilised. Of course if there are some who would suffer thereby we can only try to ameliorate individual cases of suffering. It is not evident that because here and there some innocent persons suffer we should refuse to exercise the rights which belong to society as a whole. If a right is reserved to re-purchase or to abolish a corporation and that is done once it will be a lesson to others hereafter to be careful about purchases of stocks and bonds. They will then look into the reserved rights of the general public.[21]

Compensation is required by the Constitution of the United States and very generally by our State Constitutions; certainly such requirement seems to be desirable. As Mr. Ritchie has pointed out in his work on *Natural Rights* the expression "just compensation" in our Constitution is not accurately defined; just as when we say that no one shall be deprived of property without "due process of law", it is not certain what due process of law is. Ideas vary in regard to this, and we have also to define in particular times and places what we mean by "due process of law".[22]

There is only one further suggestion. Some one might say, Where is the gain to society in the case of the Western Union Telegraph Company or of a similar concern, if we must make full payment? We have seen that there is a gain to society because we have arguments which would induce us to make the change, and the arguments are based upon the hypothesis that some other form is more advantageous than private property. If this is true, then we would have a greater amount of

real wealth production. But there is one particular sort of gain to which attention may be called. Through purchase in cases of this kind we would have a unification of the industrial apparatus and frequently where such change is desirable it is intended to bring about a unification in the ownership and operation of a certain kind of business. Thus if we could at once bring about an absolute unification in the telegraph business and prohibit any possible future competition we would add many millions of dollars to the value of the existing telegraph plant. In the same way the railway property of the country would, according to one estimate, be worth a thousand million more than at the present time if it could all be brought under one harmonious management, and all the dangers of competition for the future could be abolished.

Attention is called to the fact that in some cases we have an abolition of rights or what we might call in a large sense expropriation without compensation. Wagner gives this illustration: When the right of the general public to hunt on the lands of others was abolished no compensation was made.[23] While some more or less general rights have been expropriated by private individuals without any compensation, we cannot on that account believe that it is either right or expedient that the general public should expropriate without compensation the rights of individuals.

We might say that expropriation means the substitution of one form of property for another. Expropriation does not carry with it the idea of the abolition of property or of lessening the property of individuals, but of a forced change in the form of property of individuals.[24]

Notes and References to Chapter XX

[1] P. 484. In connection with the general subject of this chapter, the following cases illustrating the power of the state over the use of private property and the preservation of natural resources (Conservation) are cited: Commonwealth *v.* Tewksbury, 11 Metcalf (Mass.) 55 (1846); McCready *v.* Virginia, 94 U. S. 391 (1876); Town Council *v.* Pressley, 33 S. C. 56 (1889); Manchester *v.* Massachusetts, 139 U. S. 240 (1891); Fallbrook Irrigation Dist. *v.* Bradley, 164 U. S. 112 (1896); Geer *v.* Connecticut, 161 U. S. 519 (1896); Townsend *v.* State, 47 N. E. (Ind.) 19 (1897); State *v.* Ohio Oil Co., 150 Ind. 21; 49 N. E. 809 (1898); Ohio Oil Co. *v.* Indiana, 177 U. S. 190 (1900); Kansas *v.* Colorado, 185 U. S. 125 (1902); City of St. Louis *v.* Galt, 179 Mo. 8 (1903); Manigault *v.* Springs, 199 U. S. 473 (1905); Clark *v.* Nash, 198 U. S. 361 (1905); Windsor *v.* State, 64 Atl. (N. J.) 288 (1906); Georgia *v.* Tenn. Copper Co., 206 U. S. 230 (1907); Kansas *v.* Colorado, 206 U. S. 46 (1907); *Ex parte* Elam, 91 Pac. (Calif.) 811 (1907); Hudson Water Co. *v.* McCarter, 209 U. S. 349 (1908); Wilson *v.* Hudson County Water Co., 76 N. J. Atl. 560 (1910); Light *v.* U. S., 220 U. S. 523 (1911); U. S. *v.* Grimand, 220 U. S. 506 (1911); Oklahoma *v.* Kansas Nat. Gas Co., 221 U. S. 229 (1911).

Mr. Justice Holmes says, in Hudson Water Co. *v.* McCarter (209 U. S. 356):

"The private right to appropriate is subject not only to the rights of lower owners (on a river), but to the mutual limitation that it may not substantially diminish one of the great foundations of public welfare and health. . . . We are of opinion further that the constitutional power of the State, to insist that its natural advantages shall remain unimpaired by its citizens, is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the State is not required to submit even to an æsthetic analysis. An analysis may be inadequate. *It finds itself in possession of what all admit to be a*

great public good, and what it has it may keep and give no one a reason for its will."

[2] P. 485. The literature of the subject: First of all we may mention Professor Wagner's *Grundlegung*, 3d ed., Pt. II, Bk. III, Chap. III, pp. 527–64; and in connection with Wagner's work attention should be specially directed to von Ihering's *Der Zweck im Recht*, 1st ed., Vol. I, pp. 514 *et seqq.* (4th ed., 1905, pp. 411 *et seqq.*). In regard to expropriation von Ihering takes the position which is in harmony with his general idea of property and with the ideas of Wagner. He does not treat the subject at any very great length, but he reverts to it constantly and brings out his general idea of expropriation and puts it in harmony with his ideas of property. The following works are for the most part mentioned by Wagner in his bibliographical note in connection with his treatment of the subject:

Die Steuer und das öffentliche Interesse, Neumann, pp. 107 *et seqq.*, especially 178 *et seqq.*, pp. 212–235. The chief interest in Neumann's treatment is the interpretation of what is a public purpose (*öffentliches Interesse*). He gives considerable space to the question whether or not the advancement and promotion of beauty is a public purpose and discusses the way in which the subject has been treated in various countries at the time he was writing, 1887.

The principal work on the subject, treating it more thoroughly than any other from an economic point of view, is that of Ferdinand Lassalle, *System der erworbenen Rechte*, Bk. I, sec. 7, pp. 193 *et seqq.* This work, of which the great jurist Savigny spoke as one of the ablest of the nineteenth century, is written with an appreciation of the economic significance of law, which very few of the writers of legal works have had; but we may hope to have more of such appreciation in the near future. It is especially in the first volume that we find a discussion of the subject. Two of the principal works dealing with the subject from the standpoint of the philosophy of law are: B. Stahl, *Philosophie des Rechtes*, 3d ed., Vol. II, 1, § 18, pp. 343 *et seqq.*, Trendelenburg, *Naturrecht*, § 100 for *dominium eminens*, H. Rösler, *Das soziale Verwaltungsrecht*, p. 530. Expropriation is treated as one of the social duties and obligations of property but is restricted to land. L. von Stein, *Die Verwaltungslehre*, Vol. VII. Two legal works may be mentioned: one by George Meyer, *Das Recht der Expropriation*, Historical Introduction. He discusses the right of

expropriation in the Roman law and its development in the Middle Ages. There is also an article on Expropriation, under the title "Enteignung" in the German *Dictionary of Political Science* (Gruenhut, in *Handwörterbuch der Staatswissenschaften*). This article treats the subject especially from a legal point of view.

Among the more recent purely legal writings treating of the subject especial mention may be made of Randolph on *Eminent Domain*, 1894, Lewis on *Eminent Domain*, as a well-recognised American legal authority, in two volumes, 3d. ed., 1909, and Nichols on *Eminent Domain*, 1909.

[3] P. 485. This undue haste in converting public property into private property is further illustrated in the case of the White Mountains, New Hampshire:

"Up to 1869 the State owned the greater part of the White Mountains and Coos County. The policy of the State was to dispose of its public lands as fast as possible, and large tracts were sold for almost nothing. During recent times, however, the value of land has increased very rapidly, and now, owing to the growing scarcity of spruce in the State, good forest land commands an excellent price. The best spruce land brings from $20 to $30 per acre, according to the stand and quality of the spruce and its accessibility for lumbering. The greater part of the country, however, is cut over, and much of it badly burned. Such land, with little or no mercantile spruce and covered with hard woods, is worth from $2 to $4 per acre. Burned or abandoned land can be bought for from $1 to $2 per acre." U. S. Department of Agriculture, Bureau of Forestry, Bulletin No. 55, "Forest Conditions of Northern New Hampshire", [1905], p. 15.

[4] P. 486. The New York *Independent* of August 8, 1901, gives the following account of the rush for land in Oklahoma: "There are in the reservation about 13,000 homestead tracts of 160 acres each. Long before the drawing there were 50,000 people in camp on the border, and when the books were closed on the 26th ult., applications had been filed by a little more than 167,000 persons."

A writer in *Harper's Weekly* for August 10, 1901, says: "I was in the rush for land in Cherokee Strip (in 1893) when the run was made for land. In that hundreds of people fell beneath the mad racers, and were either killed or injured. In this opening no one was injured in the rush. In the previous openings the 'sooners' took all

the best land, but here the man whose name was drawn from the wheel of chance then secured a clear title to his farm."

[5] P. 489. R. R. Co. *v.* Davis, 19 N. C. 451 (1837). See also Dyckman *v.* Mayor, etc., of N. Y., 5 N. Y. 434 (1851); Scholl *v.* German Coal Co., 118 Ill. 427 (1887); Foltz *v.* St. Louis & S. F. Ry. Co., 60 Fed. 316 (1894).

[6] P. 489. *Eminent Domain* (2d ed.), Vol. I, p. 618.

[7] P. 489. Vol. 15, p. 603, citing the following cases: Googins *v.* Boston R. R., 155 Mass. 505 (1892); *In re* Metropolitan El. R., 2 N. Y. Suppl. 278 (1888); Southern Kansas R. *v.* Okla. City, 12 Okla. 82 (1902).

[8] P. 490. Ladd *v.* City of Boston, 151 Mass. 585 (1890), at pp. 585 (headnote), 588.

[9] P. 492. *Grundlegung*, 3rd. ed., Vol. 1^2, Pt. II, Bk. III, Chap. III, pp. 534–5.

[10] P. 493. *Op. cit.*, pp. 528–9.

[11] P. 494. Water expropriation has been upheld in western States for private irrigation on the ground that that really is a public purpose under those circumstances. See Clark *v.* Nash, 198 U. S. 361 (1905). Similarly private mining railways in a mining State. See Strickley *v.* Highland and Bay Gold Mining Co., 200 U. S. 527, at p. 531 (1906).

[12] P. 496. *Der Zweck im Recht*, 3rd. ed., Vol. I, pp. 526–7. "Die Bedeutung der Expropriation wird meines Erachtens völlig verkannt, wenn man in ihr einen *Eingriff* in das Eigentum, eine *Abnormität* erblickt, die mit der 'Idee' desselben in Widerspruch stehe. In diesem Lichte kann sie nur demjenigen erscheinen, der das Eigentum lediglich vom Standpunkte des Individuums erfasst (*individualistische Eigentumstheorie.*)

"Dieser Standpunkt ist aber für das Eigentum nicht minder ein verkehrter als für den Vertrag. Der allein richtige ist der der Gesellschaft (*gesellschaftliche Eigentumstheorie*). Von diesem Standpunkte erscheint die Expropriation so wenig als eine Abnormität oder ein Verstoss gegen die Eigentumsidee, dass sie umgekehrt durch letztere selber in unabweisbarer Weise gefordert wird. Die Expropriation enthält die Lösung der Aufgabe, die Interessen der Gesellschaft mit jenen des Eigentümers zu vereinigen, sie macht das Eigentum erst zu einem praktisch lebensfähigen Institut; ohne sie würde es sich zu einem Fluch der Gesellschaft gestalten."

[13] P. 497. See Ch. 712 of the Laws of New York for 1899, popularly known as the "Ford Franchise Tax Law," which is now a part of the tax law reënacted by Ch. 62 of the laws of 1909 as Ch. 60 of the Consolidated Laws of the State of New York. Subdivision 3 of sec. 2 of the Tax Law contains the definition for purposes of taxation of the terms "land", "real estate", and "real property". This definition includes all structures in the public streets constructed under public franchises, as well as the franchises themselves. Under the tax laws of New York special franchises, which are assessed by the State Boards of Tax Commissioners, include inseparably the physical structures in the streets and the right to maintain them.

The constitutionality of the Ford Franchise Tax Law was attacked in the courts, but was sustained by the Court of Appeals in a case reported in People *ex rel. v.* Tax Com., 174 N. Y. 417 (1903), which was subsequently affirmed by the United States Supreme Court in People *ex rel.* Met. St. Ry. Co. *v.* N. Y. Board of Tax Com., 199 U. S. 1 (1905).

[14] P. 497. Wagner, *op. cit.*, p. 542.

[15] P. 497. J. B. Clark, "Capital and its Earnings," *Publications of the American Economic Association*, Vol. III, No. 2, p. 67. "Eminent domain, by changing one capital in form, may preserve or increase a hundred others in substance. It is in the interest of value, the fruit of personal sacrifice, that the course is taken. If land, then, is anywhere dangerously monopolized, take it, pay for it, and use it as you will. Expediency here has much to say, but not equity. You will have guarded the essential wealth that, by your invitation and in your interest, has vested itself in this form. The evidence of *a priori* law, and the practical signs of the times, indicate that measures not a few for the diffusion of land ownership are in store for us in future eras. What our government has already done it may do hereafter, though in the face of greater obstacles. It may divide lands and put owners and cultivators upon them, even though it cannot continue always to present a farm to every man who asks for it. The land reform of the future will curtail great holdings and multiply small ones, while protecting to the uttermost the value that is anywhere invested."

[16] P. 498. Wagner, *op. cit.*, p. 545.

[17] P. 501. In his article on the "Transformation of Rio de Janeiro," which appeared in the *Independent* for January 30, 1908.

[18] P. 503. *Das System der Erworbenen Rechte, eine Versöhnung des positiven Rechtes und der Rechtsphilosophie*, 2d ed. edited by Lothar Bucher, Vol. III, § 7, pp. 163–251.

[19] P. 507. Unless a sacrifice in wealth is involved which nevertheless is desired for the sake of the better distribution of what remains—a poorer society but with better distribution. It is doubtful if such a case would arise.

[20] P. 508. It has been surrendered by the Massachusetts legislature.

[21] P. 509. An illustration of the right reserved to purchase is the right of Wisconsin municipalities to purchase public utility plants at a valuation fixed by the Wisconsin Railroad Commission.

[22] P. 509. Due process of law is understood to mean in the United States that a man shall have his day in court. But what marvels have not American courts accomplished with this phrase. Schemes of inheritance taxation, measures to compel owners of mines to weigh the coal mined at the mouth of the mine in such a way that their wage-earners may be convinced that they are honestly credited for the amount of work they do, laws to compel payment in lawful money instead of in kind, and, in fact, almost any plans of reform if antagonistic to the philosophy of the judges, may be declared unconstitutional because among other things it is not due process of law. A curious essay could be written by a student who should investigate scientifically the load "due process of law" has had to carry during the history of the United States. In England, of course, since 1688 an Act of Parliament is due process of law.

[23] P. 510. This particular illustration does not seem felicitous. If hunting and shooting had remained free in Germany, long ago there would have been no game. As it is, game makes an appreciable item in the meat supply of the public. When public rights are abolished and private individuals gain thereby, this may form a basis for special taxation, the proceeds of the taxation to be used for general measures of social amelioration.

[24] P. 510. We repeat again that *Enteignung*—expropriation used here in a wide sense—is sometimes restricted to real property, as it is in older juristic literature. Wagner extends the term for the sake of unity in the terminology, to correspond with real unity in the idea. Sometimes abolition of rights is spoken of where we have to do with rights which are not rights in real property. Wagner, *op. cit.*, pp. 554–555.

CHAPTER XXI

THE MANAGEMENT OF PUBLIC PROPERTY WITH REFERENCE TO DISTRIBUTION

In its very nature public property carries with it social control, for public property in practice should mean and generally does mean property controlled by society. Now it can be managed in such a way as to promote one sort of distribution or another sort. We can make charges for the use of public property of various kinds, or we can offer its use without any charge, and the way it is managed will influence distribution. To what extent this is true is brought out clearly by some of our programmes of social reform. For example, there lies before the author a programme issued by a candidate for the London County Council.[1] If one looks through his programme one finds it has chiefly to do with the management of public property. The candidate proposes that it shall be managed along certain lines and he wants to bring about a different distribution in that way. He says, "If elected, I shall not only oppose every attempt to cripple and abolish the Works Department, but shall do everything in my power to extend its scope and increase its activity. I believe that a Works Department means:

"A high standard of employment for the worker.

"A high degree of efficiency in work done for the community.

"A considerable saving of rates to the ratepayer. The Council should be a model employer and fair wages clauses in contracts should be rigidly enforced."

The said candidate wants to develop public property in houses, for the better housing of the workers. He wants to develop public property in hospitals. He wishes to substitute public property for private in gas works and water works, etc. He wants fire stations established, and also speaks of educational work which the Council should do. What he proposes has to do very largely with the management of public property.[2]

But all of this is simply incidental. It is brought forward merely to illustrate the significance of the management of public property.

With reference to distribution we cannot draw up any plan unless we have some ideal of distribution. Therefore, a word about the ideal of distribution. It is much better that we should not attempt to develop an ideal of our own, but that we should find out what ideals are animating men. What ideal is influencing socio-economic evolution at the present time? Let us look into the writings of the economists. Arnold Toynbee, one of the English economists of the latter part of the nineteenth century, expressed an ideal in these words: "We plead for the right of all to equal opportunities of development according to their nature." What he wanted to do was to shape distribution in such a way as to promote the attainment of that ideal,—equal opportunity for development so far as material

wealth can afford it, to each one according to his nature. Consider also the ideal of Émile de Laveleye, "The complete and harmonious development of every human faculty."

We can at any given time, as Wagner says, establish a goal for economic development, with respect to distribution as well as otherwise; and we can do so by considering at the time and place the sentiments which actually exist and which are animating men. The present ideal is: To afford equality of opportunity. If we examine the tendencies of social reform all over the civilised world, the utterances of men, the thought underlying these utterances, we find that the ideal is equality of opportunity according to the capacity of various individuals; to bring about not equality of enjoyments, but equality of opportunity, so far as may be.

In Wagner's *Grundlegung*, we have these words:

"The propriety of establishing a goal for economic development is disputed as a wrong principle because it is claimed that in this way a doubtful ideology is fostered and a false idealistic method is followed. Roscher especially has of late raised objections to the establishment of such a goal. But we are not concerned with the establishment of unpractical ideal conditions, for which no experience is available; we do not purpose to busy ourselves with depicting Utopias. On the contrary, by observation it must be shown what constitution of the national economy answers the needs of the people. On this account an investigation of principles like the preceding concerning the needs of the people (*Bedürfnisstand*) and their relation to income is unavoidable, if one will reach a theoretically and practically useful result. By such an investigation we must win a standard as free as possible from subjective arbitrariness and must use this standard

as a test of actual conditions and as a guide for economic policy. On the basis of such procedure it is quite possible to establish an ideal goal for the constitution of needs (*Bedürfnisstand*), for the constitution of national income and for the distribution of the same for a definite age and a definite people, in particular for the civilised nations (*Kulturvölker*) of our race at the present time. Especially from the standpoint of those who do not regard the system of free competition as the only or last solution of the problem of economic production or distribution, not only must the establishment of such a goal of economic development not be condemned, but it must in fact be demanded." [3]

We find that public property may be managed in accordance with four general principles, namely:

1. Monopoly principle. Fiscal monopolies.
2. Revenue principle. Private financiering with competitive profits as a guide. (*Oeffentliche Unternehmung*).
3. Cost principle. Public financiering (*Oeffentliche Anstalt*), fee principle.
4. Gratuity principle. (*Allgemeines Genussgut*).[4]

The monopoly principle means simply the charge which yields the largest net returns. This is the principle which is followed by private monopolies the world over.

The revenue principle means the management which will yield profits. According to this principle the property is not managed in such a way as to get the utmost possible revenue out of the people, but simply to get that revenue which would be afforded by the capital invested competitively, together with any gains which may result from the unification of the business. This

is the principle in accordance with which the Prussian railways are managed at the present time. It is aimed to secure profit and to bring into the public treasury some of those gains which result from unification; but the prices charged are not monopoly prices.

The cost principle is sometimes spoken of as a fee principle. That is followed the world over in the case of the post-office. The post-office charges may sometimes yield a slight profit, but not usually.[5] The principle is so to arrange charges that the total or aggregate income will merely cover expenses. It is called by some the principle of public financiering, while the revenue principle is sometimes called private financiering.

Under the gratuity principle the services or commodities are offered without charge to the consumer, freely, like public parks. It has been proposed occasionally that this method should be used in the management of water works. Then it remains for the taxpayers to supply the cost.

Each of these various principles will have its appropriate influence upon distribution. We have to compare the results of a diffusion of benefits under, let us say, gratuitous service, with the results of a diffusion of benefits under management according to one of the other three principles.

Considering a diffusion of the benefits of a public undertaking through gratuitous service, we must ask and must attempt to answer the question, How generally are these services enjoyed? Is it best, we ask, to make the water works a gratuitous service? Do we thereby distribute the benefits as widely as we could if

we made a charge for the service, or perhaps even derived a profit from the service and then distributed the gains through some other public enterprise? Then we have further to ask, How is the burden of support to be distributed through general taxation, provided the service is not a self-supporting one? Furthermore, what effect upon true well-being has the enjoyment of the service rendered? Would one say it would be a good thing for the government to manufacture whiskey and distribute it gratuitously? Apart from any other consideration, would the enjoyment of this service or commodity be deleterious? We have to ask, Is it desirable to encourage the use of the service? If it is desirable to encourage the use of any service, that is a reason for approaching as nearly as possible the principle of a general enjoyment good. But we must also consider other and indirect results of this policy; for example, we must thereby lessen the use of some other service or commodity, because our resources being limited, the use of part of them for particular purposes diminishes these resources and leaves less for the satisfaction of other needs. Sometimes we call a good or service gratuitously offered a general enjoyment good. Then we must also ask, What effect will gratuitous service have upon the cost of the service? Would it tend to wastefulness? This is one argument against free city water.[6] It is thought by many that, although it is desirable to encourage the use of water on the part of the poor people, yet the result of absolutely free water would be a great waste and a disproportionate cost which would have to be met by the burden of taxation. This is disputed, but without

good ground; experience is quite to the contrary and favours water meters and charges for the use of water.

Then we must ask, What effect will gratuitous service have on incomes? We must look beyond the present. Let us suppose that a city owns and operates street car lines gratuitously. This has been proposed by Henry George and when we look into it, the argument is far stronger than it might at first seem. If street cars were operated without charge, they could be operated much more cheaply. We could dispense with conductors except where they are needed for the protection and the service of the general public. We could dispense with a great deal of apparatus for the control of revenues, etc. But what effect would such gratuitous service have on incomes? In New York City, take the wage-earner with an income of $2 a day. Will it still be $2 a day if this service becomes gratuitous? Can we in that way transfer the benefit to the ordinary consumer who is not protected by some sort of social arrangement? If the wage-earner has gratuitous street car accommodations, will there be an increased pressure of labour from without, lowering wages? Will it be an additional inducement for men to come to the city from the country? Or will the gain perhaps be transferred to owners of house property? Can rent be increased correspondingly? Such questions as these arise.

On the other hand, we have to answer questions like these: Are profits on public undertakings objectionable? Are they to be regarded as indirect taxation? This view is sometimes held as an argument against munic-

ipal operation of public business. In answer to this we may say that we cannot admit that the ordinary profits on public enterprises are indirect taxation unless all profits are indirect taxation. A man is not worse off if he pays $1.50 for gas per thousand into the city treasury, than if he pays it into the treasury of a gas company. If the city does not charge a higher price than the gas company would probably charge, it does not seem that the profits can be regarded as indirect taxation; still less can they be so regarded if the price charged is lower than would be charged by a private corporation. And in the second place, we cannot admit that indirect taxation is always objectionable.

We must ask ourselves also, how, under existing circumstances, will such profits be used? Now contrary to the opinion of a good many, it is quite possible that profits might be used in such a manner as to diffuse the benefits of a public undertaking more beneficially than would be done either by a self-supporting service which just barely covers costs, or by a service gratuitously rendered. It is possible that we could do more for the people of Chicago by operating the street railways, provided they were municipally owned, with a five cent fare and by using the net revenue for the improvement of the schools than we could by operating them at cost and diffusing the benefits in that way. If we use the profits for school houses, playgrounds, etc., we would render life more wholesome and would not have put in operation forces which would naturally tend to a diminution in the rate of wages. We would, on the contrary, have put in operation forces which tend to a higher

standard of life and to a population better able to look out for itself. So in many cases we may do better to use the profits for some public purpose than to lower charges. But on the other hand we must consider the scattering of population by lower fares to suburbs. As part of the policy of spreading population over a far larger area, low fares are desirable. Do we not rather want the zone system for steam railways, electric elevated lines, etc., with improved service?

But we cannot lay down any dogmatic rule. We must consider all the circumstances of time and place, and the considerations mentioned must be held in mind. The following is, however, the author's formulation of a law or rule:

In proportion as a service or commodity tends to the upbuilding of character and personality, we should so far as fiscal conditions permit gradually move in the direction of the principle of gratuitous service. If the service or commodity itself is widely consumed and is as desirable as any vendible commodities which would probably be purchased from possible revenues yielded by charges for the service, particularly if large consumption is desirable and waste in consumption does not become excessive, the principle of gratuitous service may be recommended.

Let us briefly consider these points. *In proportion as a service or commodity tends to the upbuilding of character and personality* we should move in the direction of the principle of gratuitous service, because if it upbuilds character and personality there is nothing better we could do than to distribute the service as widely as possible. If we had a revenue from the service, what better

use could we make of the revenue than to provide other services for the upbuilding of character and personality? *So far as fiscal conditions will permit.* Sometimes one would wish to go farther towards the principle of gratuity than is possible because the fiscal conditions at a particular time and place may be such as not to permit the desired movement. *If the service or commodity is widely consumed,* then we have a wide diffusion of benefit. *If the service is as desirable as any vendible commodities, then also, if large consumption is desirable and if waste does not become excessive.* Take the case of public parks. There we may have large consumption without waste. The best we can do then, is to pass over to the principle of a gratuitous service.

Consider also free schools. We can operate them as money-making institutions if we desire to use the revenue for public service, but we could not purchase anything that would be generally regarded as more desirable than the service of the public schools; and we would have the loss of collecting the revenues and expending them again. The post-office furnishes a desirable service which should be widely used, and we could not purchase anything more valuable than the provision of this service; but if we have a free service of the post-office, there will be danger of waste. No reason is apparent why we should ever adopt the principle of gratuitous service for the post-office. In the case of the second class mail matter, newspapers, etc., many hold that we have a waste, believing it possible to use to better advantage the money expended to cover the deficit. They believe it possible to confer

more benefit upon the people than is derived from this large output of newspaper product.[7]

When we consider railways we must adapt our principle to the conditions which obtain at a given time and place. We must always bear in mind the danger of great waste under free service or service below cost, but where we have a well developed railway system publicly owned and operated, serving the entire country and diffusing benefits widely, we would be justified, so far as passenger traffic is concerned, in moving towards the principle of self-supporting service, because we could not with the net revenue confer any greater or more widely distributed benefits, than those which would accrue to the people through cheap travelling facilities. But so far as freight service is concerned, we do not want to change to self-supporting service. We could do better to derive a moderate net revenue and use this in the public interest as Prussia does. Some think that Prussia would do better to have lower charges rather than to use the net revenues for public purposes. But this is not clear. The charges are certainly less than when the railways were private property, but now that the net revenues amount to several hundred million marks a year,[8] there are those who think a middle ground would be preferable.

When we consider the revenues derived from land and forests publicly operated there does not seem to be any reason why the state should charge less than market rates. There we have not an exclusive service of the general public, but a service also rendered by private parties, and it is not desirable to disturb the operations

of private producers. In such a case where we have a service rendered chiefly by private persons and only to a subordinate extent by public bodies, it seems desirable to charge the market price and then use the net revenue for the general interest; that is the only way in which we could distribute the benefits. If the products of the Prussian state farms should be offered for less than the market price, a few people would buy them up and derive the benefit which should belong to the rest of the community. There is no other way to diffuse benefits than to use the net revenues for the public interest.

[1] P. 517. James Ramsay MacDonald.

[2] P. 518. It is interesting to note that the Wisconsin Railroad Commission treats privately owned and publicly owned utilities differently from the standpoint of profits and interest. Interest is allowed on the entire investment in both cases, but in the case of publicly owned utilities the lowest rate (which could naturally be secured by the public) is allowed, while in the case of privately owned utilities the current rate of interest is allowed. Profits are held by the Commission to be made up of various elements such as gains due to chance, gains of bargaining, speculative gains from risks assumed and wages of management. The Commission allows all reasonable profits in the case of private ownership. While we can find no statement of the Commission differentiating publicly owned utilities from the standpoint of the amount allowed as profits, it is quite certain that less would be allowed than in the case of privately owned utilities.

See Dick *et al. v.* Madison Water Comm. 1910, 5 W. R. C. R. 731, 744–745, 755.

[3] P. 520. 2d ed., pp. 169–170.

[4] P. 520. This classification is found in Sax, *Verkehrsmittel.*

[5] P. 521. We can at best speak here only of broad general tendencies. The post-office in Germany, for example, is not indifferent to profit.

[6] P. 522. The danger of waste, in the case of water, is shown by the attitude of the Wisconsin Railroad Commission against straight rates per fixture and favouring meter rates. Experience shows that under a straight rate per fixture a great deal of water is wasted.

[7] P. 527. We do not propose to enter into this controversy with which we are not now concerned, but the *status quo* must be considered. A proposal favoured by ex-President Taft of higher postage for magazines has attracted much attention. The publishers of American magazines fight this because they say that their business has been built up on the basis of a postage rate of a cent a pound, and that a much higher rate, even on their advertising matter, would

ruin them. Have they vested rights? Would the public suffer by this suppression? These questions deserve careful consideration.

[8] P. 527. According to the *Statistisches Jahrbuch für den Preussischen Staat*, the gross income for 1910 was 1,994,430,000 marks; the net income, 449,120,000 marks. The corresponding figures for 1905 are: gross income, 1,580,070,000 marks; net income, 504,690,000 marks.

CHAPTER XXII

THEORIES OF THE ORIGIN OF PRIVATE PROPERTY [1]

The origin of property suggests two lines of inquiry: we may examine (a) into the historical origin, or (b) into the logical and philosophical justification of property, the philosophical foundation of property, the ideas upon which property rests. But as Aristotle has well said, that may be first in idea which is second in order of time. What we have in mind now and here is chiefly an examination into the logical and philosophical foundation of the right of private property; this has some connection with the historical origin, but the two lines of inquiry differ to a considerable extent.

We have various theories to explain the origin of private property,—theories of the foundation of the right of private property is a better expression. The following is an attempt to classify the various theories of the origin of property under heads.

Theories of private property:

I. The natural rights theory.

II. The social contract theory; also called social compact theory.

III. The human nature theory.

IV. The occupancy theory.

V. The labour theory.

VI. The theistic conception of property.
VII. The robbery and violence theory.
VIII. The legal theory.
IX. The general welfare theory.[2]

Let us take these up one by one and discuss them briefly.

I. *The natural rights or natural law theory.*[3] The following is a statement of this theory as given by Émile de Laveleye in his work on *Luxury* (p. 151): "property is the *sine quâ non* of man's individual development and of his liberty. He must have a domain in which he can act as master; otherwise he is a slave. Property is the external sphere of liberty, and it is therefore a natural right." These are the words in which he states the theory, and then he pertinently asks this question, Is a tenant deprived "of the external sphere of his personal liberty?" The question might be so answered as not to refute the theory completely, but the answer would show that property must serve some other purpose. A correct theory of property must include the idea that it may be worked by those who do not own it.

The Kentucky Constitution of 1850, Article 13, Bill of Rights, Section 3, states this natural rights theory as follows: "The right of property is before and higher than any constitutional sanctions; and the right of the owner of a slave to such slave, and its increase, is the same, and as inviolable as the right of the owner of any property whatever." The theory of natural rights is that property rests upon something broader than all laws and Constitutions, that statute law must simply recognise it. This theory is very clearly shown in the article already

quoted from the Kentucky Constitution. In the first place, the framers of the Constitution laid down the natural rights theory of property in general and then put slavery under that head, basing it upon the same natural rights upon which property in general rests. The right of property is, then, higher than any constitutional sanction; this clause stood in the Kentucky Constitution until recently. It was taken over into the Kansas Constitution of 1857, but the Kansas Constitution did not go so far as to put it under the head of Bill of Rights, which states human rights in general abstract terms, but put it into Article 7 under the head of Slavery. There we find this same statement of the doctrine of natural rights of property, including slaves as property and representing that property in human beings and slaves is higher than, and exceeds, constitutional sanction. So the Constitution may not change the right, as it did not establish the right. That was not true, as a matter of fact, for through changes in the Constitution we did change the right. The Constitution of Kansas, in 1858, Article 1, Bill of Rights, Section 1, stated a different doctrine of property in these words, "All men are by nature free and independent and have certain inalienable rights, among which are those of enjoying and defending life, and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety; and the right of all men to the control of their persons exists prior to law and is inalienable." Section 19. "Private property shall ever be held inviolate, but subservient to the public welfare." Now the men who framed the second Constitution had a different point of view

from those who framed the first. They looked upon property as subservient to human welfare and adopted in a limited and timid way the social theory of property. They placed persons first, while the earlier Kentucky and Kansas Constitutions placed property first.

We need scarcely say very much about this theory of property. The extracts from these Constitutions are in themselves a commentary on the theory, which is simply "dogmatism in disguise", and the disguise is transparent. No reason is given, but the statement is set up as its own reason. We cannot discover any natural rights existing prior to Constitutions among men. Professor Ritchie says, "We can only allow natural rights to be talked about in the sense in which natural rights mean those legal or customary rights which we have come to think or may come to think it most advantageous to recognise." [4] That is, those legal and customary rights which are socially beneficial. We notice also a weakness in this theory of the foundation of property when it is advanced as a justification of property as it exists at the present time, for we can just as well use this argument of natural rights to attack the institution as to uphold it; this is because it is dogmatism in any case. On the ground of natural rights the socialists attempt to show that the present theory of property is untenable, because it violates what they consider natural rights. The advocates of the single tax use a theory of natural rights to show the iniquity, as they consider it, of private property in land.

II. *The social contract theory.*

The social contract theory holds that property is a

product of the original compact by which men entered into society, that men left the state of nature and established society under certain conditions, one of which was the institution of private property and the substitution of private property for common property. As this theory of social contract has in general been given up, we need not consider it at length at this time.

III. *The human nature theory:* property is the outgrowth of human nature.

We take up third the theory which is closely analogous to the first, so much so that one might almost place it under the same head. It is not quite clear that it is absolutely necessary to separate this theory, but while it involves a similar line of argument, it proceeds from a somewhat different point of view. The human nature theory takes several forms. We might speak first about:

(1) The infant argument, the argument based upon the characteristics of the infant. Even an infant seizes and retains things and it is said that this shows that property is innate in human beings. We might answer that this argument is worthy of the understanding of an infant. What does property mean? It means not only "this is mine," but it means the second step, "that is thine," and who ever knew an infant to take the second step? Quite the contrary. An infant believes that all the world is his. What we see in the case of the infant is acquisitiveness which knows no bounds. No infant sees the distinction between mine and thine. Lieber, among other arguments, advances this one, but does not make much of it. He says: "Children will call a certain peach on the tree mine, another thine, without

the least reference to its final consumption. The child is anxious to have a bed in the garden of its parent merely to call it his own. When children look at flying birds, at passing clouds, they are apt to single out one or the other and call it mine, yours, etc. . . . Children in houses of refuge are most anxious to have a little box of their own." [5] Of course this is true enough, and even as adults we like to have things turned over to us for our exclusive use and enjoyment and control. But this does not carry us very far in a theory of property.

(2) Property and the personality of men. This form of the human nature theory is one which is worthy of attention. It is presented by writers like Fichte, Stahl, Bluntschli, Lieber [6], etc. It is said that property is needed for the development of men, that it is needed for the extended personality of men, that it is external nature individualised, that it gives a field for the economic activity of men. This is all very true, but does it state anything very definite? Does this justify property as it exists at the present time? But this universal need of property is made the basis of attacks upon property. Property is needed for the development of man. Then what about those who have no property? What about those who, having property, turn it over to the use of others? Lieber says: "Each man is a being of himself, an individual, his individuality is all-important. He has a natural aversion to being absorbed in an undefined generality. From early childhold man feels an anxiety to be a distinct individual, to express it, and consequently to individualise everything around him. Man must ever represent in the

outward world that which moves his inmost soul. . . . *Property is nothing else than the application of man's individuality to external things or the realisation and manifestation of man's individuality in the material world.*" He continues, saying that there always was property, but that property meant sometimes this and sometimes that. This does not give us any definite content or bounds for property. Lieber himself perceives this and recognises the necessity for limits which are not conveyed by this concept. He speaks about the great dangers of acquisition, about avarice, which he calls the second of the cardinal vices; and he speaks with approval of laws which have existed to limit property. He also speaks of the various methods by which property is acquired. Lieber says that the process of the individualisation of things is accomplished by production, by appropriation, by occupancy, by force, by positive declaration of law, by conveyance of right to others. But titles, he says, are not absolute, as they may be regulated or interfered with by society. Too large an accumulation, he says further, is prohibited by many societies. Lieber does not express this as one exclusive idea, but as one among others. His argument does not rest upon any clear analysis. He says in regard to copyright: "I do not mean to say that perpetual copyright is necessary according to natural justice. The sovereign action of society can regulate this as well as any other." We have, then, the sovereign action of society limiting and regulating property, and that with approval by Lieber. We require some other theory in order to give us clear thought.

Wagner presents (but does not advocate) this human nature theory in a somewhat different form. He says that we have (1) the "natural" theory of property, deriving property from human nature in general, and from the idea of individual personality, and (2) the natural economic theory, deriving the theory from the economic nature of man. He speaks of the economic nature of man, and of property as the outcome of this economic nature, upon which idea this theory is based. It is considered that this is applicable to property in general, and that it holds in particular with respect to land and capital. That is, the economic nature of man, and the nature of man as manifested in his economic life, is such that it necessarily leads to property. Property is demanded by economic self-interest, which plays so large a rôle in the motives of men. And this self-interest, it is maintained, is to the advantage of society, as it leads to diligence, to saving, etc.[7] All this gives us only certain general suggestions and nothing more. We have nothing clear and precise as yet.

IV. We take up the *occupancy theory*.

There are various statements of this theory. A frequent one is that found in the Roman law, in which the following phrase gives expression to it—"*Res nullius cedit primo occupanti*." That which belongs to no one becomes the property of him who takes or seizes it. Philosophically stated, the idea is that man extends his will over objects of external nature, and thereby subjects these objects to his own will and makes them his. That is to say, he can do this provided no other person has extended his will over the same external objects.

But the truth is that the Roman law recognised various origins of property; and this is simply the dominant philosophical explanation.[8]

A very fine distinction, and perhaps in many respects an excellent one, is drawn by the philosophical jurist, Stahl, between the idea of the German law and the idea of the Roman law. He says that the idea of the Roman law is that which is appropriate to the conquering nation, to a nation which did not found property upon the right of labour but upon the right of seizing things. On the other hand, the Teutonic idea is that of production. The world is not given ready-made to man or in a form adapted to his uses, but it is for man to produce things which he needs. The conquering nation did not rest its institutions upon toil, but upon simply seizing things which had no master or which belonged to the enemy. And with occupancy is joined the idea of prescription; that is, the title is acquired by taking things and holding them for a certain length of time.[9] Hugo Grotius and Blackstone are advocates of this theory. But with de Laveleye we must ask the question, Does occupancy establish legitimacy? Must we not first establish the legitimacy of occupancy? Lieber expresses himself as follows:

"The ideas mine and thine must have originated with the first thoughts of men. . . . Affection itself must soon have given birth to the idea of mine and thine. There is no heart so cold, no intellect so dull, which is not struck at once by the force of the term, or the feeling expressed by the words, 'my child,' 'thy son.' . . . Applied to things, to objects of the inanimate world, the idea must present itself at an equally early period. The father has to provide for his children;

the absolute necessity establishes the absolute duty to do it. If he has broken off a branch of bananas for himself or his children, and some one else would take it from him, he would answer at once in the most practical and most philosophical manner, 'The bananas are mine, I plucked them.' The title is proved in this case in the most forcible manner by that mode by which we prove, and conclusively too, so many elementary positions—the exclusion of all the contraries: 'To whom should this belong, if not to me?' Has he not exerted himself to obtain them? Has he not by his industry established already a closer relation between them and himself, than anyone else? The same is the case with his arrow, spear, the first animals he tamed, the first plants he saved, the first trap he made. They wear the imprint of his labour, they are identified with himself. If the thing to be appropriated belonged to no one, to whom can it possibly belong if not to him who took pains to obtain it?"[10]

Lieber here mingles several theories, namely: the human nature theory, the labour theory and the occupancy theory.

An objection occurs, however; this theory implies that the original form of property is individual property, if here we have to do with an argument which is historical as well as logical. It implies that individual property arose first as a matter of fact. If modern researches, however, do not warrant the unqualified statements that the first form of property was not individual, but was common, it is unquestionably true that common or tribal property very frequently comes first, and it is after all a good authority who uses these words: "It can be proved conclusively that in the case of productive property, and especially in the case of land, common and not individual property was the original

form." [11] And how did we acquire common property, and how pass over from that to individual property? Lieber's theory assumes that we passed directly from free goods to individual property. Yet we cannot say that occupancy never gives title. Prescription and international law recognise occupancy to a certain extent. In the case of lands occupied by uncivilised tribes, occupancy is recognised at the present time by international law.

Water rights in Colorado and elsewhere are acquired by occupancy, for this is what the doctrine of appropriation means; for we do pass here to private property, or "the beneficial use" of the state-owned water from free goods, or *res nullius;* or more strictly, according to legal theory, from state property.

Sovereignty is not the same thing as acquired property. Sometimes we see the statement that the Philippines cost us so much per acre. That is an inaccurate statement; we have not bought the land. It still belongs to the individuals, the sovereign rights over the land are vested in this country rather than in Spain, but that is all.

V. *The labour theory.*

The fifth theory, the labour theory, is prominently identified with Locke, and is found stated in his *Civil Government.*[12] The Roman jurist Paulus advanced this labour theory, but Grotius replied that it presupposed occupancy, for how is one to labour on land unless one has already taken possession of it? Also it presupposes that we pass from free goods to individual property whereas, in many cases, we do not do so. In water and

in our public domain, we virtually do so, but technically we pass from public to private property. Let us take, however, the statement of the theory which we find in Locke,—"The great and chief end of men's uniting into commonwealths and putting themselves under government is the preservation of their property." [13] As if they had property before they do that! They do not, as we can see in Africa to-day. We might say rather the acquisition of property. Locke has the idea of property as something existing prior to civil government. We notice this also in Locke, that in property he includes "life, liberty and estate," and speaks about the property men have in their persons as well as in goods. This must be borne in mind in discussing Locke's views. He says that property is acquired through labour, because through labour a man mingles his personality with external nature. He says that the labour which I put upon a piece of ground mingles with the ground; then he speaks about the labour of my servant and my horse. This seems curious. Here we have mixed ideas. He says that labour mingles with the soil and causes agriculture to flourish, but that it may be the labour of the servant or the horse. What then about the servant who says, "My toil is mingled with the earth"? How did he have a servant, or property in a human being? Then he says also: "At least it becomes my property when there is enough and as good left for others." As much land as a man tills he may enjoy, so long as there is enough and as good left for others. We might consider this a desirable arrangement; but supposing there is not enough and as good left for others? Then Locke

says further that through labour a man acquires as much as he tills, but through the institution of money a man may acquire much more than he can naturally acquire. We have this theory presented as the foundation of the right of property. Abstinence is, by this theory, put on the same footing with labour, and is connected with the theory of saving.[14]

Adam Smith seemed to think of labour as the best and most satisfactory foundation of property; that the property which every man has in his own labour is "the original foundation of all other property." Mill, when he reduced property to its essence, said that it was what one produced by one's own exertions, or acquired or purchased from some one who had produced it by his own exertions. Locke's theory frequently assumed the form of the natural rights theory. That is, "I have a natural right to that which I produce with my own toil."[15]

The labour theory applies to property in severalty and to things individually produced, but collective property, not individual property, was very generally first, and production is now a social process. In modern times we do not have things for the most part individually produced, but socially produced. This theory cannot stand any critical test as the exclusive foundation of property. Wagner says, with some truth, that the labour theory points rather to the end of evolution than to its beginning.

VI. *The theistic conception of property.*

We next consider the theistic conception of property. This theory means that property is ordained by God, as are the family and the state. We need not dwell upon

this, because it does not give us any definite and precise concept. It is reconcilable with all forms of property. It does not mean anything more than that God has given to the sons of men the earth for their use, and that they must divide it up among themselves. As to what the content of property is, this theory does not afford any precise answer.

VII. *The robbery and violence theory.*

This theory is very generally held by the socialists and anarchists when they claim that property rests originally upon might and robbery and that it still means theft. The idea of Proudhon and of Marx is that property is an institution through which the toilers are robbed by other classes of society.

VIII. *The legal theory.*

This is the theory of Hobbes and Montesquieu and Jeremy Bentham. Hobbes, in his *Leviathan,* says that property was established by law, as embodied in the sovereign. His statement is as follows:

"Seventhly, is annexed to the Soveraignty, the whole power of prescribing the Rules, whereby every man may know, what goods he may enjoy, and what Actions he may do, without being molested by any of his fellow Subjects: And this is it men call *Propriety.* For before constitution of Soveraign Power . . . all men had rights to all things; which necessarily causeth Warre: and therefore this Propriety, being necessary to Peace, and depending on Soveraign Power, is the Act of that Power, in order to the publique peace. The Rules of Propriety (or *Meum* and *Tuum*) and of *Good, Evil, Lawful,* and *Unlawful* in the actions of Subjects, are the Civil Laws; that is to say, the Laws of each Common-wealth in particular. . . ."[16]

Montesquieu expresses the theory in these words:

"As men have given up their natural independence to live under political laws, they have given up natural community of goods to live under civil laws.

"By the first, they acquired liberty; by the second, property . . . the public good consists in every one's having his property, which was given him by the civil laws, invariably preserved."[17]

Jeremy Bentham gives us a legal theory in the following words:

"Property and law are born together, and die together. Before laws were made there was no property; take away law, and property ceases."[18]

We cannot have property without law, for through law possession ripens into property. This is a true theory, but stated thus it is insufficient because there must be justice and public order and moral law behind statute law. Stated in this bald way, it seems to imply that law could do whatever anyone might think desirable, that the law had unlimited power. It also leaves out of consideration the idea of evolution as well as ethical ideas. Probably, however, no great authority ever intended to assert the legal theory of property absolutely without qualification. Jeremy Bentham, for example, is first of all a utilitarian and his ideas of utility underlie his entire political philosophy.

IX. *The general welfare theory.*

So we advance to the real, the correct theory, the general welfare theory. The very words of this theory point to the permanent basis of property in social utility

and they indicate the nature of its evolution. This is the social theory of property. Property exists because it promotes the general welfare and by the general welfare its development is directed. The statement seems simple enough, but it indicates a movement which carries all before it and is irresistible. It is a theory of social evolution, because as society is in a flux, property can accomplish its end only by a corresponding evolution. It is a legal theory, because property in itself implies law; and it is only through law that possession ripens into property. At the same time the words used to describe the theory show that law cannot be arbitrary.

Free goods make way for property. Public property is transformed into private property, and private property again into public property, and extensive forms of property make way for intensive forms, because all this evolution promotes the general welfare.

Irrigation in the United States furnishes an excellent illustration. Irrigation in a crude form can be traced back to a period which in our New World we call a remote past,—probably seven hundred years. The Pueblo Indians occupied and irrigated lands long ago; so also did the Mexicans. Long before the settlement of the West by Americans the Spanish missions in California employed irrigation. But these early methods were very largely, as we might say, happy-go-lucky. The use of water was a very extensive one, rather than an intensive one, and there was no highly developed system. The Mormons in the middle of the nineteenth century and the colony of Greeley, Colorado, twenty years later,

began modern irrigation in the United States. Where mere possession existed it had to make way for full property, into which it often ripened.

Less extensive uses yielded to more intensive uses. The cattlemen of the plains were satisfied with mere possession for flocks and herds and waged many bloody battles to prevent the development of full property by permanent settlers. But the general welfare demanded a more intensive tenure, and the permanent settler fought a winning fight. The common grazing grounds have for the most part disappeared, and the remainder are rapidly dwindling. The old Texas trail of the cattlemen has become a thing of the past.

The old common law doctrine of riparian rights stood in the way of the extensive and intensive use of water, and in the irrigated sections of our country this doctrine has been abolished, either explicitly as in Colorado, or by modifications through statute law and judicial decisions until it has become an essentially different thing. The doctrine of riparian rights was regarded in England as a "natural right". It seemed to Englishmen a thing right in itself, not requiring statute law to establish it, that the owner of land should receive the uninterrupted flow of streams crossing his fields: but the so-called "natural right" has had to yield to the necessities of social coexistence.

The Colorado Constitution of 1876 established the doctrine of appropriation in these words:

"The water of every natural stream, not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public and the same is dedicated to

the use of the people of the State, subject to appropriation as hereinafter provided."

This is an occupation theory. The legal maxim holds, "First in time, first in right." We have consequently the so-called "priority of appropriation", and rights are determined by numbers, as Priority 1, Priority 2, etc. This theory involves great waste in the use of water, and in the Reclamation Service of the United States it has been made a condition that those enjoying its benefits should yield such priorities as they have in order that new rights should be assigned upon a basis which makes possible a more economical and intensive use of the water. The Reclamation Service means the abandonment of *laissez-faire* and the substitution for *laissez-faire* of a system of regulated social relations. The general welfare has dictated the evolution of new and higher forms of property rights.

Turning to England, we find a similar evolution in the case of the enclosures of land, which resulted in a higher and more intensive use. Here as elsewhere we have a period of conflict as we pass from lower to higher forms of property, with constant claims of oppression on the part of those who are injured thereby and who are frequently termed, with more or less truth, the disinherited. What higher civilisation must give us is a reduction of pain to the individual in this transition from lower to higher property forms. This pain is the price of social progress, but it may be greatly lessened, and should be reduced to a minimum.

This concludes our study of property. Where do we now stand? We find that distribution takes place as

the result of the struggle of conflicting interests on the basis of the existing social order, and of this social order we have examined the main feature, namely, private and public property. Distribution takes place then not on an exclusive basis of private property, for we have also public property. Moreover, private property itself is not absolute but limited in intensivity.

This, then, is the point that we have reached in our study of distribution.

Notes and References to Chapter XXII

[1] P. 531. The literature of the subject: See first of all Wagner, *Grundlegung*, 3d. ed., Part. II, Book II, Chap. II, sec. 102–125, pp. 210–252, which is used freely in this bibliography. Émile de Laveleye, *Primitive Property*, pp. 382 *et seqq.;* Knies, *Geld*, pp. 84. *et seqq.;* Proudhon, *What is Property?* (*Qu'est ce que la propriété?*) This treatment has met with praise by Wagner, although the work itself is an extremely radical one, which is highly valued by one school of anarchists. The treatment of the origin of property, however, is praised by those who are not in sympathy with the work itself. *Cf.* Karl Diehl's work on Proudhon. Von Scheel, art. on "Property" (*Eigentum*), in the *Handwörterbuch der Staatswissenschaften.* Also other works may be mentioned on property,—Fichte, *Naturrecht und Geschlossener Handelsstaat;* Hegel, *Rechtsphilosophie;* Trendelenburg, *Naturrecht;* Ahrens, *Naturrecht.* Also Lieber, *Political Ethics*, Vol. I, Bk. II, Chap. II.

[2] P. 532. Wagner arranges theories under three classes:

A. Human nature theory,—our 1, 2 and 3.

B. "Theories of property which axiomatically set up a definite principle of property in the concrete case (*im konkreten Fall*) and make this principle the universal foundation upon which they will establish the institution of property as such. But in this mode of procedure there exists a logical fallacy. The supposed foundation-principle is really only a postulate for the private order of property—a postulate of justice." Our 4 and 5.

1. Occupation.
2. Labour.

C. Theories which do not attempt to found property on human nature and which do not seek to found it on a definite principle of acquisition in the concrete case,—that is to say, a postulate of justice. A product of positive law. Our 8 and 9.

Grundlegung, 3d ed., Vol. II, pp. 210–217.

[3] P. 532. This is discussed by Ritchie in his work on *Natural Rights*, Chap. XVII, "The Right of Property," and to this work the present chapter owes much.

[4] P. 534. On p. 270 of his *Natural Rights.*

[5] P. 536. Lieber, *Political Ethics*, 2d ed., Vol. I, p. 112.

[6] P. 536. *Op. cit.*, Chap. II.

[7] P. 538. See Wagner, *op. cit.*, p. 213.

[8] P. 539. Professor Roscoe Pound's *Readings in Roman Law*, Part V, "The Law of Property," pp. 78–121, especially sec. 46 on "Occupation," pp. 89–92.

[9] P. 539. "Occupancy matured by prescription" is a phrase found in Gladden's *Tools and the Man*, p. 6.

[10] P. 540. *Op. cit.*, Vol. I, pp. 109–110.

[11] P. 541. H. von Scheel, art. "Eigentum," *Handwörterbuch der Staatswissenschaften*. The historical work of English scholars during the past generation seems to cast increasing doubt upon the idea that common property comes first. See Ashley, *Surveys Historic and Economic, passim*. And it should be emphasised that common occupancy must be distinguished from common property. Great confusion has arisen by the use of this word common in England, where the common arable fields are strictly private property.

Ethnologists to-day are generally of the opinion that the concept or idea of property first arose in connection with intimate personal belongings,—wives, weapons, etc. See Ely's *Evolution of Industrial Society*, and the reference to Lapsley, p. 48, footnote 2. But it is sufficient that we sometimes pass from common property to individual property and that sometimes individual property comes first.

[12] P. 541. Book II, Chap. V. See also a review of Locke's theory by Ritchie, in the *Economic Review* for January, 1891, and reprinted in his *Darwin and Hegel*, Chap. VI.

[13] P. 542. Locke, *Of Civil Government, Works* (1823 ed.), Vol. V, Bk. II, § 124.

[14] P. 543. On cultivation of soil and abstinence as ground of capital, *cf.* Wagner, *op. cit.*, pp. 214, 258 b.

[15] P. 543. This is the form the argument took in Henry George's letter to Pope Leo XIII; and the Pope in his reply to Henry George bases his doctrine on labour, and uses Locke's argument about land. Henry George contrasts the fish caught and the land.

[16] P. 544. *Leviathan*, (London, 1651), Pt. II, Chap. 18, (p. 91).

[17] P. 545. *The Spirit of Laws*, tr. by Thomas Nugent; London, 1878 (Bohn Library), Bk. XXVI, Chap. 15 (Vol. II, p. 160).

[18] P. 545. *Theory of Legislation*, p. 113. (London, 1870).

PART II

CONTRACT AND ITS CONDITIONS

CHAPTER I

INTRODUCTORY OBSERVATIONS

The first thing which strikes us in the study of contract in its economic aspects is the paucity of the literature on the subject, especially so far as these economic aspects fall under the head of distribution. Contracts are nearly as important as property, with which they are so closely associated that we can say that we cannot have property in the present sense without contract. It is not intended to imply, however, that property carries with it unlimited right of contract. Restrictions of contract are quite compatible with the institution of property. Such restrictions are not in opposition to the idea of property. That follows from what we have already said concerning the nature of property. But still in the main our idea of property carries with it the right of contract.

Shall we say that contracts are as important as liberty? Perhaps we should scarcely want to say quite that. But this we can say, that the definition of contract gives a large part of its meaning to liberty. It gives to liberty its content and its interpretation.

Yet in general we have given little attention to contract, regarded from the economic point of view. Nevertheless if private property is once assumed, distribution

is brought about more by contract than by any other one force. Distribution is brought about by bargaining, but on its legal side bargaining means contract.

Now what is the reason that contract has received so little attention? One reason is that its immense importance in our economic life is something relatively new. As time goes on, *our economic life is more and more made up of social relations;* and the importance of contract keeps pace with the growth of these social relations. This is because contract means relationships—chiefly economic relationships—existing among men, and we can hardly mention any economic relation which is not based upon contract. There are some that are not, but the most of them are based on contract. Marriage is more than contract, and the relations of parent to child are not relations of contract. These afford illustrations.

Our earliest economic life was mainly a life of households and groups, within each one of which authority and ancient customs regulated relationships. As life has gone forward each step in advance has broadened out the economic unit and multiplied relationships which have on the whole been decreasingly regulated by customs, important as these always have been and still are; and these relationships have been more and more based on contractual agreements in which elements other than usage enter. It is not surprising, then, to be told by Bagehot that the oldest law was a stranger to contract. He gives as a reason that while in modern times choice determines nearly all that we do, in earlier times choice determined scarcely anything; an impor-

tant truth notwithstanding an exaggeration of our present freedom, and probably an exaggeration of the extent to which choice was absent in earlier times. Bagehot uses these words:

"It is connected with this fixity that jurists tell us that the title 'contract' is hardly to be discovered in the oldest law. In modern days, in civilised days, men's choice determines nearly all they do. But in early times that choice determined scarcely anything. The guiding rule was the law of *status*. Everybody was born to a place in the community: in that place he had to stay: in that place he found certain duties which he had to fulfil, and which were all he needed to think of. The net of custom caught men in distinct spots, and kept each where he stood." [1]

Still more impressive is the treatment of the historical evolution of contract given by Sir Frederick Pollock in his article on Contract in the eleventh edition of the *Encyclopædia Britannica*. He shows that only slowly and with great difficulty did the modern state receive the idea of binding agreements to be enforced by public authority. For a long time ecclesiastical courts were called upon to render their assistance, because evidently they were concerned with truth and could therefore visit with disapprobation and condemnation those who did not keep their agreements. To break faith was held by the Church to be a sin. For a long period our English ancestors, as we are told by this authority, had no notion of the state's duty to enforce private agreements. Contract grew up "gradually and unsystematically, by shifts and devices," the judges playing a large rôle in this beneficent growth. Thus the secular courts finally

recognised it as their duty to enforce agreements of economic significance and thus made these agreements real contracts. But the theory under which the creditor could collect debts due him was even in Blackstone's time, in the latter half of the eighteenth century, that he was getting back his due and it was not looked upon as the result of contract. Social purpose prevailed and overcame one part of mediæval individualism. Historically, the evolution of contract rests on the perception that social welfare required the enforcement of certain classes of agreements by public authority. All this is shown conclusively by Sir Frederick Pollock in his excellent article in the *Encyclopædia Britannica*.

Even Professor Wagner did not include contract as one of his fundamentals in the first edition of his *Grundlegung*. Although he directed his thoughts to those things which underlie our economic life, it did not occur to him to mention contract, and for this he was criticised by the economist, Held. But although in later editions he does mention contract, he does not develop the subject. So we may say that one reason why contract has not been adequately discussed, is that it is comparatively new; and in the United States, where contract is of special importance, we have had little economic philosophy up to the present time. Consequently in the discussion of literature reference must be made largely to those works on political science and jurisprudence which show some appreciation of the philosophy of contract. And we must give special attention in this connection to the works on the *police power*,[2] because in the United States the police power

means the power exercised for the general welfare, in the permissible curtailments and limitations of individual rights of contract as well as of property. This will receive further explanation and become clearer as we proceed.

Notes and References to Chapter I

[1] P. 557. *Physics and Politics*, International Science Series, p. 29; Trav. Ins. Co. ed., pp. 446–7. For the slow growth of the modern concept of property, see especially Pollock's article on contract in the eleventh edition of the *Encyclopædia Britannica.*

[2] P. 558. Freund's *Police Power* is the standard American work on this subject. American judicial decisions give the foundation of the police power as it existed at various times. These come under the interpretation of the Constitution; many of the more important cases are found in Thayer's *Cases on Constitutional Law* (2 Vols., 1895). Standard works on the Constitution are authorities on the police power, and Cooley's *Constitutional Limitations* (7th ed., 1903) deservedly ranks high. Willoughby on *The Constitutional Law of the United States* (2 Vols., 1910) may also be specially mentioned as the work of a political scientist rather than that of a lawyer. *The Development of Law as Illustrated by the Decisions relating to the Police Power of the State* by W. G. Hastings (1900) is of special importance to the economic student of property and contract, for the study of decisions made by its author shows the constant struggle of the courts to give a shape to these concepts which corresponds to the economic demands of time and place.

General Bibliographical Note on Contract

First of all we may place works on jurisprudence which take up contract in its relations to other legal rights; and for the student of economics Holland's *Jurisprudence* (11th ed., 1910) is to be commended. Pollock's *Principles of Contract* is one of the best works on the subject and for American readers the work of Pollock called "Wald's *Pollock on Contract*," edited by Wald, and then by Williston (1906), is especially worthy of notice. Anson on *Law of Contract* (2d. American ed. with American notes by Huffcut, 1907) is also excellent.

These are a few of the most useful works for the student. Various other books are mentioned elsewhere in the notes.

CHAPTER II

CONTRACT DEFINED AND DESCRIBED

We all understand that contracts are agreements of economic significance. For example, I agree to sell you a horse for $100. This is an agreement of economic significance. If I agree to take a walk for pleasure or to play tennis, that is not usually an agreement of economic significance. We all understand in the second place that contracts are agreements which are legally binding; that is to say, they are enforceable by the state. This suggests an analogy with property. We do not have property until we have possession, use, and enjoyment of economic goods guaranteed by third parties. So long as I can enjoy valuable economic things, merely while I can hold them by my own physical strength, I have possession of a certain sort but I do not have property. A third person must come forward who will secure to me the exclusive use of economic things before we have what we can call property. So it is with contracts. If I have to enforce my own agreements, then we have no contract; only when a third party, and that third party public authority, comes forward to enforce agreement, do we have contract.

Taking these two elements together we have this definition, which is perhaps sufficient for our present purposes:

Contracts are agreements of economic significance which are enforceable by public authority.

This definition is from our own point of view. It has been objected that labour contracts are not enforceable against wage-earners; consequently that our definition does not cover these contracts. But in theory labour contracts are enforceable. Difficulties may and do arise in the application of the remedies which are at present available. Contracts for personal services are never specifically enforced. Where there are damages clearly capable of proof it is not often that suit is entered for indemnification. Even those who are as high in the scale of employment as university professors and instructors are seldom held very strictly to their contracts, and no case is known to the author in which damages for violation of contract for services have been recovered by a university.

While all of this must be admitted, it cannot be claimed that in consequence the theory of the enforceability of labour contracts has no significance. Progressive thought is inclined to favour the provision of means for enforceability in order to give arbitration a wider scope and application. In New Zealand, especially known on account of its progressiveness, enforceability of labour contracts is a part of compulsory arbitration. It has been proposed by some that labour organisations as such should be held responsible for the contracts made by their members; and this would seem to be a necessary part of any workable scheme of compulsory arbitration.

We notice also in certain cases a tremendous pres-

sure of public opinion in favour of adherence to labour contracts by the wage-earners. This is illustrated by the case of the Anthracite Coal Strike in 1902, when Mr. John Mitchell and the other labour leaders very clearly recognised the force of public opinion in favour of the acceptance of the award of the strike commission. It is probably not an overstatement to say that they felt compelled to accept it.

We have remedies provided also, imperfect though they may be, in the case of employees of certain public utilities, especially those who hold peculiarly responsible positions, such as the locomotive engineers. They may be restrained by injunction, and, apart from injunction, they may expose themselves to penalties if they abandon their employment in such a way as to incur risk of destruction of life and property. The injunction, then, furnishes at least a partial remedy.

We observe also in various decisions of courts an inclination to hold the funds of trade unions liable for damages in certain cases and even to extend this liability to the individual members of labour unions.[1] The most noteworthy cases, perhaps, in this country are those connected with the boycott; but liability could be extended for breach of contract.

It is not proposed now and here to discuss the desirability of these various measures to secure the enforceability of labour contracts. It is simply intended to call attention to the fact that various remedies are possible, and that from the point of view of progressive measures it is desirable to provide more effectually than at present for the enforceability of labour contracts.

We conclude, then, that this element of enforceability by public authority is applicable to labour contracts as to others.

While our definition would include all the elements of contract, it may be well to elaborate it somewhat further in order to direct attention to points of vital significance.

Holland gives this definition of contract in the widest sense, "*A concurrence of two or more wills in producing a modification of the rights of the parties concerned.*" [2] This would include the assignment of property, like the purchase of a watch. I make payment then and there. In a case like this the force of the contract gives rise to what we call in jurisprudence "rights in rem"—rights in things, and the force of contract is instantaneously spent. But an agreement to buy in the future and to make a payment in the future, gives rise to "rights in personam." As a matter of fact, contract usually relates to the future rather than to the present. There are those who restrict contract to an agreement with respect to the future and not to those agreements which are instantaneously fulfilled. For example, Woolsey says,[3] "A contract is a transaction in which at least two persons, or parties, acting freely, give to one another rights and impose on one another obligations which relate wholly or partly to some performance in the future." But the present author agrees with Holland rather than with Woolsey as to the nature of contract. Those which relate to the future, however, are the main class of contracts. Other writers bring forward more or less clearly the idea of futurity. Savigny, as

quoted by Holland, says, "The union of several in an accordant expression of will."

Holland gives an analysis of contract which is especially excellent, and it is reproduced with an important modification at one point. He says that the "constituent elements of a contract are, (1) several parties; (2) a two-sided act by which they express their agreement; (3) a matter agreed upon which is both possible and legal; (4) is of a nature to produce a legally binding result; (5) and such a result as affects the relations of the parties one to another; also (6) very generally either a solemn form or some fact which affords a motive for the agreement." [4]

It may be well at this point to call attention to the difference between our inquiries and those of a law textbook. The law enters fully into private aspects from the standpoint of litigation; for example, when a contract is formed there must be a proposal by a promisor and this must be accepted by a promisee. The law has a great deal to say on these two points—how long the offer holds and when an acceptance completes the contract. It is surprising to find how many points of difference there may be. I offer you my house for $5,000. You accept then and there, and it is sold. But suppose you come to me one year afterwards, and I say, "No, I cannot accept it now." Does the offer hold good five minutes, or one minute? Take the case of an auction. How long does the offer hold and when is the contract completed? It is completed when the hammer falls and not before. Suppose I make the offer by post, and I say "awaiting your answer by return mail." Think

of all the contingencies which could occur and which would have to be discussed in the law court. Suppose death comes to me before the answer is received, and the offer is accepted. Are my heirs held by that acceptance? Suppose the letter is delayed by the carelessness of a third person and the answer comes by return mail, but much later than I expected. Am I bound in the matter? Or suppose the postman delivers it at the wrong house. Does the offer still hold? To show all the investigation and inquiry which may arise under this head, it may be mentioned that there are three different theories of German writers about the acceptance and also about the revocation of an acceptance or offer. (Holland, p. 266). One is called the declaration theory (*Aeusserungstheorie*)—"it is enough if the acceptance is posted"; another is the receiving theory *Empfangstheorie*)—acceptance must reach the offerer; and the third is the recognition theory (*Vernehmungstheorie*)—acceptance must actually come to the knowledge of the offerer. According to the English courts, says Holland, we have the following conclusion: "An offer is irrevocable after it has been accepted. Acceptance must be no merely mental act, but a communication to the proposer, which may, however, be sufficiently made by posting a letter containing it, although this letter may be delayed, or even fail altogether to reach its destination. A revocation of an offer dispatched before, but reaching the acceptor after, the posting of the acceptance comes too late. A revocation of an acceptance posted after, but reaching the proposer simultaneously with the acceptance, probably prevents the

formation of the contract." (Holland, p. 267). A great many interesting questions arise at this point. While we want the law to be as clear and explicit as possible, whether we are governed by one theory or the other, makes but little if any difference in the distribution of wealth. We see, therefore, that a great deal comes into a law court, relating to private litigation which we put aside because it is irrelevant to our special purposes.

Now let us examine more closely some of the constituent elements of a contract, as stated by Holland.

I.[5] There must be two or more persons or parties for, as is well pointed out by Anson, the idea of plurality is essential to agreement.[6] One of the parties is the promisor and the other the promisee, under the Roman law debtor and creditor (these terms now have generally a more restricted meaning). There are three classes of persons, according to the common law, who are under disabilities with respect to contracts, namely, infants, married women, and lunatics. But it should be observed that particularly in the United States statutes have removed many of the disabilities of married women in the matter of contract.

II. There must be "a two-sided act, expressive of agreement." There must be an offer and an acceptance. The offer and acceptance may be by an agent. But with all this we are not specially concerned.

The matter of oneness or unity of wills between the contracting parties is posited in the large majority of definitions. Sidgwick in his definition [7] brings out the point so strongly that his definition itself seems to con-

tain a covert plea for a theory, namely, "a coincidence of free choices." He does not, however, give this as a formal definition. He means that there must be an agreement, a oneness of will. Savigny, in his analysis of contract, says that it must presuppose an agreement, a oneness of will. Holland advocates the "objective theory" and speaks of "the will as voluntarily manifested." And this seems to the author to be correct, because an intention not to keep an engagement does not free one from the engagement. I may make an agreement, and my will may not be at one with the will of the person with whom the agreement is made, but that does not release me. A contract merely assumes a manifestation of will as that would be interpreted by a reasonable man, or a judge and jury.[8] This voluntary manifestation of will implies an absence of force. An agreement made under threats to destroy a man's house would not be a contract. A bargain with a drowning man to save his life for a million dollars would not be a valid contract.

It is clear that the will of one party must not be influenced by fraud, misrepresentation, etc., neither must there be undue influence, as between attorney and client, guardian and ward, or parent and child. A contract between attorney and client might be declared null and void, because the position of the attorney is one of trust, and he must be governed by the interest of his client. The same would be true between parent and child, if one of the two is in a dependent condition, etc.[9]

The possibility of development along this line is great. Shall we take into account the pressure of hunger? Do

the needs of the wage-earners enter into account, the pressure under which they may be placed? For example, we have what is called the ironclad contract which workingmen are obliged to sign, pledging themselves not to join any labour organisation under certain penalties. Does such an agreement have force? Is it voluntary and an expression of free will? Shall the court take into account the pressure of need? *The decision will depend upon the economic philosophy of the courts. There is no way to determine by any absolute criterion.*

III. The matter agreed upon must be both possible and legal, and to what Holland says the present author adds, not contrary to the public policy. An agreement to sail away to the moon is not a contract, nor is an agreement to make a man a prince.[10] But suppose a matter becomes impossible that was once possible. Probably a man would be held for damages, and would have to make the contract good by indemnity although this is a matter of controversy.

The matter agreed upon must be legal. *Agreement cannot make an illegal thing legal.* This must be clearly understood; otherwise the law would have no force. In fact, an attempt to secure benefits by such an agreement is apt to become a conspiracy and so one kind of crime. We have a great development of conspiracy through judicial decisions in the United States in the treatment of relations of labour and capital. Agreements to do things which are held to be illegal, immoral acts, are not binding contracts. According to Mohammedan law, an agreement for the sale of pork and wine is not a contract. In England marriage brokerage, an

agreement to find husbands or wives, would not be a valid contract. An assignment of the salary of a public officer is not generally valid. It is held not to be valid because it is a contract against public policy.

Holland rejects "public policy" as an "unruly steed", and he quotes a decision of the Master of the Rolls of the English court, to the effect that men should have the utmost liberty of contracting and that they should be held to their contracts. In his opinion this is true public policy. While no one would wish to dissent from the general proposition that men should be held to their agreements, Holland goes too far and indeed the present author does not hesitate to say, altogether too far when he rejects public policy as setting metes and bounds to private contracts. Certain things are provided for in this way which are not provided for by a statute and cannot be provided for thereby, and it gives contract the much needed element of flexibility. It was to give this element and to prevent things injurious that the idea was introduced. It seems that the idea that a contract must not be contrary to public policy arose out of the efforts of the judges to prevent the admission of wagers in the common law as legal contracts. In this country the principal class of decisions under public policy relates to agreements "in restraint of trade". In 1898 the author said of these decisions that they had been directed against the workingman, but that did not prevent their being directed differently in the future; and what has happened since the draft of the present book in that year shows how true this is, and should lead those to hesitate who say that the courts are always

against the workingman. Where this seems to be the case and where there is a real grievance, it is often an antiquated social philosophy which is at fault and not a bias against a class.

Public policy makes it possible to reject agreements of an immoral character even if there is no statute which forbids them. Probably under public policy would we have to place the rule that a man may not deprive himself of liberty with respect to contract. In England, as the law has been interpreted until recently, a man could not agree not to become an ironmonger, because he thereby deprived himself of his liberty to contract with respect to the future. A partial restraint, however, was binding and legal; for example, an agreement not to compete within certain limits. A man could agree not to become an ironmonger or manufacturer in the city of Birmingham.

The law as stated has, however, been somewhat modified by recent decisions, especially the Maxim-Nordenfelt case in the House of Lords. The English law respecting agreements not to compete is about as follows. *Agreements in restraint of trade are legal and binding when the restraint is* (1) *merely incidental to the main purpose of the contract, providing this main purpose is legitimate, and* (2) *not more than coextensive with the interest to be protected.*

Under this rule the restraint (agreement not to compete) may be more than local, and may even be world-wide. This is accepted law now in England, and it probably is in the United States, although American courts are far more antagonistic with respect to any

agreements in restraint of trade, the so-called Sherman law especially forbidding any agreements which have a tendency in the direction of monopoly.

A contract not to marry is against public policy. A wager about the death of Napoleon I was not legal, because it gave a money interest to some one in the death of a foreign sovereign and involved the danger that it might disturb international relations. We have the possibility of immense development along the line of public policy as limiting the right to make valid contracts. In the constitutional development of the United States, it is especially important to hold to this element of flexibility, as it is only through this flexibility that we can solve the problems brought us in economic development.

IV. The agreement must be of a nature to produce a legally binding result. For example, an agreement to take a walking tour or to go to a dinner party is not ordinarily of a nature to produce a legally binding result, and consequently is not recognised by the state. Agreements of this kind could be entered into as contracts, but are not usually held to be such because they do not *purport* to be entered into as legal obligations.

V. It must be a result which affects the relations of the parties to each other. An agreement among a board of directors of any institution is not a contract because it does not affect the relations of the parties to each other. An agreement on the part of a board of regents to appoint somebody to a professorship is not a contract so far as the relation of the members of the board to each other is concerned. The relations of the

parties to each other must be affected, in order that an agreement may become a contract.

VI. There must be either some solemn form or some fact which affords a motive. As a rule there must be some consideration, but there is no inquiry into the adequacy of the consideration. Contracts read "for value received", but in recent times there is usually no inquiry into the adequacy of the consideration, on which account this does not signify very much. We can have a consideration which is merely nominal. The acceptance of a franchise, even if really a very great special privilege, makes a contract in the case of a company, the acceptance being the consideration. In England there must be consideration except in contracts under seal. When the seal is used consideration is presumed. Now, however, there are no formalities except in special cases. In real estate contracts the formalities are more numerous and serious than elsewhere, even in the United States where land is so frequently bought and sold.

Finally, we notice the distinction between contracts which are void and which are voidable, voidable contracts being those not necessarily void, but which may be made void by the proper action.

Notes and References to Chapter II

[1] P. 563. See *Boycotts and the Labor Struggle.* By Harry W. Laidler, with an Introduction by Henry R. Seager, especially Chap. IX. "Danbury Hatters' and other cases."

[2] P. 564. Chief Justice Marshall defined a contract as follows: "A contract is an agreement in which a party undertakes to do, or not to do, a particular thing." Sturges *v.* Crowninshield, 4 Wheat. 122 (1819). This is simple and clear, but for our present purposes inadequate.

[3] P. 564. *Political Science,* Vol. I, p. 32.

[4] P. 565. Holland's *Jurisprudence,* Chap. XII, 11th Ed.

[5] P. 567. Following Holland.

[6] P. 567. See Anson, *Law of Contract,* 2d Am. ed. by Huffcut, p. 2.

[7] P. 567. *Elements of Politics,* Chap. VI, "Contract," p. 78.

[8] P. 568. Holland, *op. cit.,* p. 262.

[9] P. 568. Holland, *op. cit.,* p. 269.

The following quotation from a standard American work is of special interest in this connection.

B. W. Jones on *Law of Evidence:*

Sec. 13, p. 15. "In the ordinary transactions of life fairness and honesty are presumed and conveyances, sales and contracts generally are presumed to have been made in good faith until the contrary appears."

Sec. 190, p. 228. "When a question arises between a trustee and a beneficiary or between other parties who are in a fiduciary relation as to the good faith of transactions between them, a peculiar burden is imposed upon the one in whom the trust is reposed. When the complaining party proves such relation, the burden of proof is cast upon the trustee or other person holding the relation of trust to show that the transaction is fair and reasonable and that all proper information has been given the other party. . . . This rule applies, for example, to agents, attorneys, clergymen, physicians, partners, trustees, guardians and to executors and administrators. A similar

rule is applied to the dealing of a parent with his child, *when the circumstances are such that undue influence may be naturally inferred,* and the dealings of a child with an infirm parent, when the dealings are such that the former assumes a fiduciary relation."

[10] P. 569. *Encyclopædia Britannica*, 9th ed., Art. "Contract."

CHAPTER III

THE ECONOMIC SIGNIFICANCE OF CONTRACT, ESPECIALLY WITH RESPECT TO THE DISTRIBUTION OF WEALTH

Perhaps the first thing which suggests itself by way of preliminary inquiry is the question, What is the source of obligation in contract? Woolsey says it is the sacredness of truth. "But wherein consists the obligation to keep a contract?" Woolsey asks, and then he replies, "Some might think that it lay in the free will of the contracting parties, in their power over themselves." Probably this is what would first suggest itself as the source of the obligation of contract—that it is founded upon the freedom of the will. "But this, although it must be presupposed, is not enough. If the binding force of a contract were to be ascribed simply to the binding force of a man's free will in relation to something which was his, why might not the same will break the contract?" You make an agreement with me and it expresses your free will, but tomorrow you wish to break that contract, and that would also be an expression of your free will. "We must then seek for a moral foundation which can go along with that necessity of contract to human intercourse, which might be a reason of itself for enforcing the obligation *ex contractu*. That moral foundation," Woolsey says, "is

the sacredness of truth and the necessity of trust for all virtues that look heavenward, or towards men who could have no fellowship with one another if separated by distrust, but would be suspicious and suspecting, hateful and hating one another. If the expression may be allowed, a man by an engagement to another creates truth and can never rightly create a lie in his mind. Truth and trust are the props without which 'the pillared firmament is rottenness and earth's base built on stubble.'"[1]

What shall we say about this? We may say, first of all, that in general the state does not concern itself particularly about truth. Why then should it in this case? What are called *nuda pacta*, that is, friendly promises and agreements, are generally not enforced by the state. Woolsey says of *nuda pacta* "as mere kindness or some other moral sentiment dictated the promise, so a change of feeling or some new relations towards the promisee may lead him (*i. e.* the promisor) to recall it." [2] But if it is truth itself with which the state is concerned, why does it enforce the economic contracts and not enforce the *nuda pacta?* I promise to lend you five dollars, but tomorrow I change my mind. Why should not that promise be enforced, if it is truth with which the state is concerned? It is not truth itself with which the state is concerned. Woolsey also says, that immoral contracts and certain other kinds of contracts should not be binding. If this is so, then there is something else which ranks higher than truth. But there are some instances in which the state does concern itself especially with truth. We may say that this is so in the case of

perjury. Shall we put breaking a contract in the same class with perjury? Certainly not. Or shall we say that broken contractual promises especially promote falsehood and so create distrust, lies, etc.? Scarcely. So we must make an exception here, and we cannot therefore wholly grant the adequacy of the argument.

The truth is, that the rights of contract, like others, are acquired rights, rights acquired in society, which proceed from and are developed through the state and the ground is human welfare. In the same paragraph Woolsey shows the importance of contract to society. "Take the case," he says, "of a man who makes preparations or plans for putting up a building according to my contract with him. I induce him to give me his labour or his product and deprive him of what is his without return, if I do not keep my contract. Contract," says Woolsey, "unites the present and the future—is the principal motive to labour, and the source of union among men." "Without it division of labour would to a great extent be paralysed."[3] It not only unites the present and the future, but the past, the present, and the future. The continuity of our economic life demands security and stability. We have only to think of what contract relations are to realise this—barter, sale, credit, letting, loans, services, deposits, domestic services, agency, partnership, professional services. Under the Roman law, however, the exercise of certain professions was thought by the Romans to be of too liberal a nature to be capable of leading to a compensation in money recoverable by judicial process. Advocates, teachers of law or grammar, philosophers, sur-

veyors, and others were accordingly incapable of suing for their fees. A similar disability attaches to barristers under English law to this day, and attached till a few years since to physicians also.[4] These services were not put under the head of contracts. This point of view seems very strange to the American lawyer of to-day.

But we have not only expressed contract, but implied contract. We have implied contract in the case of railway service, as when one buys a ticket.

We see then the vast economic significance of contract. Our economic relations are based largely on contract and in its absence might would prevail. It is very largely through contract that our wealth is accumulated and our share of the national dividend comes to us. But we must be on our guard here. Many relations, as we have already said, parentage, home, education, gifts and inheritances, church, and other relations, lie outside of contract in the main; yet they may have their economic side also. Contract does not exhaust economic relations. *The state itself is the source of contract, not the result.*[5]

Contract tends to preserve advantages once secured, because the inequalities or disadvantages under which one party may labour will express themselves in contract. And as contract tends to preserve advantages secured, so it continues disadvantages—contract tends to keep the existing condition of things, or to allow existing currents to flow on. The greater the force of free and unregulated contract, the greater the extent to which private agreements regulate economic life. But when we say that the greater the force of contract the

greater the extent to which private agreements regulate economic life, we simply say that a=a. The strong want unregulated contract; they are the economic conservatives. The reform forces must advocate regulation of contract. But so educating and strengthening the weaker as to limit the required regulation of contract is also a desirable thing and, so far as it is possible, the best thing, and of this the reformer must not lose sight.

But we must now again call attention to points considered elsewhere. In the United States contract is of special significance because the States may not alter contracts. The States may prescribe conditions under which contracts may be formed, but they may not change the contracts once validly formed. The tendency of the courts, as already mentioned, is to reduce very greatly the real significance of the constitutional provisions of the State wherever they prescribe conditions under which contracts may be formed. Especially was this evident in the decision in the Broadway Street Railway case decided by the New York Court of Appeals to which reference has already been made.[6]

Moreover in the United States, according to the decision of the Dartmouth College case, advantages once secured by a private corporation can never suffer diminution; but as already stated and as is proved by citations given in Appendix IV (pp. 884–886) this has been so modified by more recent decisions and newer constitutional provisions that many jurists feel that now it has little significance.[7] The case of the tax exemption of the Baltimore and Ohio Railway in Maryland has

already been mentioned. The State having given it perpetual exemption from taxation it was decided that this advantage must stand. *This gives artificial persons a privileged position which natural persons do not enjoy.*[8] The very act whereby private corporations come into existence partakes of the nature of a contract and unless the right to do so is reserved it cannot be altered against the will of the corporation. While the right to alter and amend charters of corporations is now usually reserved in State Constitutions (the so-called "Story Proviso") it is sometimes difficult to make the reserved rights effective.[9] Natural persons, living beings, are subject to change in the laws. This is very important in many ways, especially in the discussion of social reform, and it would seem that the position which we have taken in this country is an obstacle to peaceable reform. That is the tendency at any rate. Take the case of slavery. How could it have been abolished in the United States without violation of contract? To some it is difficult to understand how with our Constitution the Civil War could have been avoided if slavery was to be abolished, because slavery was so involved in contracts that it is difficult to see how it could have been abolished without carrying with it something which would have been construed as a violation of contract. In early days a decision of the court abolished slavery in Massachusetts, but the Supreme Court, on the other hand, gave the Dartmouth College decision.[10]

When slavery was abolished in Madagascar in 1896 by the French government, the order of September 26th to this effect stipulated:

"Article 1. All the inhabitants of Madagascar are free.

"Article 2. Traffic in human beings is forbidden. Every contract of whatever form it may be, written or verbal, stipulating the sale of human beings, is null and its authors will be punished by a fine of 500 to 2,000 francs and by imprisonment for from two months to two years. In case of second offence, these penalties will be tripled. They will be applicable likewise to the public official convicted of having registered the contract or of having given his coöperation to facilitate its execution. . . . "[11]

So we see it was necessary to violate contracts in order to do away with slavery. And peonage in the South takes the form of contract, as does modern slavery generally. This is clearly shown by Mr. Henry W. Nevinson in his book, *Modern Slavery*. In speaking of slavery in the Portuguese province of Angola in West Central Africa, he shows that while men are bought and sold as slaves, it is done in the form of contract. He uses these words:

"Legally the system is quite simple and looks innocent enough. Legally it is laid down that a native and a would-be employer come before a magistrate or other representative of the Curator General of Angola and enter into a free and voluntary contract for so much work in return for so much pay. By the wording of the contract the native declares 'that he has come of his own free will to contract for his services and according to the forms required by the law of April 29, 1875, the general regulation of November 21, 1878, and the special clauses relating to this province.'"

He signs and the benevolent law is satisfied. And then Mr. Nevinson adds:

"If he runs away he will be beaten, and if he could escape

to his home . . . he would probably be killed, and almost certainly be sold again. In what sense does such a man enter into a free contract for his labour? In what sense, except according to law, does his position differ from a slave? And the law does not count; it is only life that counts. . . .

"The difference between the 'contract labour' of Angola, and the old-fashioned slavery of our grandfathers' time is only a difference of legal terms. In life there is no difference at all. The men and women whom I have described as I saw them have all been bought from their enemies, their chiefs, or their parents; they have either been bought themselves or were the children of people who had been bought. The legal contract, if it had been made at all, had not been observed, either in its terms or its renewal. The so-called pay by the plantation tokens is not pay at all, but a form of the 'truck' system at its very worst."[12]

Professor Paul S. Reinsch confirms this in the following statement:

"To-day the slave trade is carried on covertly under the name of contract labour, even by Europeans in their own colonies, especially in the Congo Free State, and in the Portuguese possessions."[13]

Notes and References to Chapter III

[1] P. 577. T. D. Woolsey, *Political Science*, Vol. I, p. 74.

[2] P. 577. *Op. cit.*, p. 78.

[3] P. 578. *Op. cit.*, p. 75.

[4] P. 579. Holland's *Jurisprudence*, 11th ed., pp. 296.

[5] P. 579. "The State a Source of Contract.—This cannot be overemphasized. Whatever may be the inherent or natural rights of man to freedom of contract, the state absolutely and unqualifiedly makes the rules and the laws of contract. I suppose you could say that one of the prime objects of government is to make the rules of the game, although the text writers and the decisions are almost entirely silent on the subject." S. P. O.

[6] P. 580. Broadway Franchise Steal. The Court of Appeals held this franchise perpetual and indefeasible and vested in directors as trustees for creditors and shareholders. People *v.* O'Brien, 111 New York (1888). The decision is referred to and described in Bemis's *Municipal Monopolies*, p. 377.

[7] P. 580. "Dartmouth College Case."—See the note on the Dartmouth College Case, appended to list of cases, App. IV, p. 884. The case did not deal with an industrial charter and was decided in a day when trading corporations, or business corporations, were in infancy.

"The New York courts, which have not been illiberal with legislation regulating corporations, have held that if any doubt arises about interpreting a franchise, it is 'to be construed in the interests of the public'; Trustees of Southampton *v.* Jessup, 162 N. Y. 122 (1900); and 'grants to a private corporation are to be construed strictly so as to prevent rights from being taken from the public, or given to a corporation, beyond those which the words of the government, by their ordinary construction, convey'. Palmer *v.* Hickory Grove Cemetery, 82 N. Y. Supp. 973 (1903).

"I quote these to show the inclination of the courts—I will not call it a tendency—toward more liberal construction, although strict construction has been the rule always in interpreting special grants." S. P. O.

[8] P. 581. In 1878 the State of Maryland made a bargain with the Baltimore and Ohio Railroad Company, which modified its tax exemption. The State gave the Company relief from its contract to pay the State one-fifth of its receipts for the transportation of passengers over the Washington branch, and the Company agreed in return to pay the State one-half of one per cent. on gross receipts of its railroads and branches within the State.

[9] P. 581. This constitutional provision was suggested by Mr. Justice Joseph Story and was very generally adopted by the States, which had been alarmed by the Dartmouth College decision, hence the name. Mr. Justice Story himself wrote the Dartmouth College decision.

[10] P. 581. While the author has good legal opinion to support his view he does not wish to be dogmatic. We know what did happen. Who can well say what might have happened? And the author remembers an observation which he heard the late Mr. Justice Brewer of the United States Supreme Court make to the effect that he had great confidence in the ingenuity of lawyers to find a way out of very serious difficulties, which might at times seem insurmountable.

[11] P. 582. *United States Consular Reports*, Vol. LIII, p. 281.

[12] P. 583. *Modern Slavery* (London and New York, 1906), pp. 27–28, 30, 37–38 *et passim*.

[13] P. 583. *Colonial Administration*, p. 64.

CHAPTER IV

CONTRACT AND INDIVIDUALISM, LIMITED AND UNLIMITED

We take up first what we will call individualism, limited. Herbert Spencer and the late Professor W. G. Sumner of Yale may be mentioned as typical advocates of limited individualism. The moderate theory of limited individualism is stated by Sidgwick in his *Elements of Politics* (Chap. VI). We may say as a general rule also that this limited individualism is the theory of our courts, although very frequently it is stated in a tone which could scarcely be called moderate; far less so indeed than we find it in Sidgwick.

As stated by Sidgwick, there are in the civil order of society, according to the individualistic ideal, two chief elements, a negative and a positive. The negative element means the protection of life and property. The positive element means the enforcement of contract. It is strange enough that in economic discussions quite generally we see simply the negative element stated as the doctrine which gives us the essential function of the state. We have all heard that the function of the state is to protect life and property, but even when we reduce the state to the individualistic ideal we must have the positive element in the enforcement of contract. All states do that in some way. It is just as much a part

of the individualistic ideal that contract should be enforced as that life and property should be protected.

But we ought to ask what the negative element means. What do we mean by protection to life and property? If we take a broad view of this, then our doctrine enlarges into what is often called socialism. If we hold that it means the protection of the capacities residing in the natural person, or the potentialities of property; if we think that it means protection of the strength and capacities of the young and provision of opportunities for the development of the powers of all the people; then we have already established large functions for the state. Or suppose it means the protection of health—and without this life certainly loses a large portion of its value for most people. But usually when the doctrine of individualism is stated it means protection to life and property in a very narrow sense of the term. It means protection of life against the attacks of the man armed with a club or gun who wants to injure some one. It means the protection of property, not so much against those who would seize it by the subtle processes of the law as against those who would put their hands in your pocket and take out your property by downright physical force. Those who present individualism as an ideal do not attempt to protect the potentialities of property, nor do they attempt to protect property against all the subtle chicanery of modern times.[1]

Now the positive element, the enforcement of contract, is a principle of combination. It makes society out of atoms. We must be able to count on the fulfilment of agreements. With contract we may have "the

most elaborate social organisation"; "at least," Professor Sidgwick goes on to say, "in a society of such human beings as the individualistic theory contemplates,—gifted with reason and governed by enlightened self-interest."

The theory is that we have a coincidence of free choices. We have to do with sane persons, adult and mature, with ordinary men and women, and the theory is that these can best promote their own interests. This is Adam Smith's theory in the main, that third parties do not know what I want so well as I do when I am bargaining with some one else. This is shown in an address by Lord Bramwell.[2] Lord Bramwell states the theory in this way, "Trust to each man knowing his own interest better, and pursuing it more successfully than the law can do it for him."

The individualistic ideal then includes these ordinary elements, mature reason, absence of coercion, no violation of law or cognisable injury, no illegal coercion. But what do we mean by coercion? Sidgwick says that coercion must be limited and strictly construed according to individualistic ideals. Declarations of intentions in themselves innocent should scarcely, according to Sidgwick, invalidate agreement; pressure ought to be strictly construed.

Suppose A gains by the distress of B, but has not produced the distress of B. He takes advantage of it. Then according to the individualistic ideal, provided A is not bound to help B, any interference to compel him to make a contract more favourable than he would otherwise make is "socialistic".[3] It may be expedient,

but cannot be defended on the ground that B is "not really free". But must A disclose material facts to B?[4] According to this theory of contract, as interpreted by Sidgwick, A is not obliged to disclose material facts to B, if the knowledge was open to B. According to individualism, A should have the benefit of his knowledge.

The English law, however, makes some specific exceptions to the general rule of individualism, because in some kinds of exchanges B is at a marked disadvantage. Indeed, the English law makes three exceptions to the general rule, namely:

I. Contracts of marine and fire insurance.

II. Contracts for sale of land.

III. Contracts for the allotments of shares in companies; that is, for the sale of shares of corporations.

Sidgwick says that in these three orders of contracts there is strong ground for the rule that even innocent non-disclosure should invalidate title. We notice that an exception is made of the sale of shares of stock in corporations. Why? Because it is so difficult for the ordinary person to know the facts; the knowledge is not ordinarily accessible to purchasers. You propose to buy some shares in the New York Central Railway. Is information concerning the facts of the business open to you? Unless the law compels disclosure of these facts, you are buying in the dark while there are others who by the very necessities of the case know more than you know or can know. But see how difficult it is to draw the line of individualism. It is just the extension of the line that is causing consternation and protest by ultra-conservatives in the United States.[5]

Another class of cases forms an exception to the rule that material facts need not be disclosed. This is the case of solicitors and clients, ex-guardians and ex-wards, because these relationships carry with them a confidential position on the part of one party to the contract. This is true even in the case of the ex-guardian and the ex-ward, because the ward will naturally have acquired the habit of looking to the guardian for advice, and the ex-ward buying something of the ex-guardian expects with propriety that material facts will be disclosed. Sidgwick, however, does not seem to think this quite consistent with the individualistic ideal. He says, "It is hardly consistent with the fundamental individualistic assumption that government may safely leave a sane adult to take care of his own interests." (p. 85).

According to Sidgwick also, the individualistic ideal carries with it the right of collective contract, the right of a body of men to contract together. Here we have a critical point in the development of the doctrine of contract and here Sidgwick parts company with the American courts, indeed with courts generally. This is not to be interpreted as meaning that the courts are opposed to collective agreements and bargains in themselves: but that combinations in carrying out their purposes naturally make agreements and bargains which involve collective interference with individual contracts and to this the courts are opposed, while Sidgwick's philosophy would allow it provided it were brought about peaceably. The American courts favour the contract of individual with individual. They say that a man's freedom is freedom of person and protection

of property, and that the clause in our Constitution providing that no one shall be deprived of liberty means that he shall not be deprived of the liberty of contracting, which they claim is a part of guaranteed liberty. So they look askance upon anything which seems to take from the individual the right to make individual contracts, and they are inclined to hold that collective agreements on the part of trade unions have a tendency to deprive the individual of the liberty of making a contract. Similarly American courts look askance upon legal regulation of contracts. They say that such reguation deprives a man of his constitutional liberty to make a contract; for example, they maintain that a man is not free if he is not allowed to make a contract for payment in kind. "You take away thus the workingman's liberty," they say. And you take away a man's liberty when you deprive him of the right to make a contract to work for seventeen or thirty-six hours continuously in a dangerous employment. It was on this ground that the Illinois Supreme Court once declared unconstitutional the law restricting the right of working women to work in sweat shops, because it was held to deprive them of their liberty.[6] This is also held to be so with regard to minors sometimes. Our courts, however, have in this case been inclined to take a different view, especially those of Massachusetts.

We find a reluctance on the part of our courts generally to give unqualified support to collective agreements. At times they show an inclination to call these agreements conspiracies: not that the collective agreements are in themselves conspiracies, but that they

often involve an interference with the rights of others which is construed as conspiracy.

Most significant of the individualistic attitude of courts is the fact that after the Combination Laws Repeal Act was passed in England in 1824, the English judges began a new development of the theory of conspiracy, and of its application to the efforts of labour combinations to raise wages, thus lessening the freedom which it was supposed Parliament had granted. A recent work gives a succinct account of the act of 1824 and of subsequent related acts which so clearly shows the movements back and forth from Parliament to the law courts that it is worth quoting at some length.

"In 1824, however, was passed the Combination Laws Repeal Act, which removed all criminal liability of combinations in advancing or fixing the rate of wages or altering the hours or quantity of work imposed either by statute or common law. The effects of this statute would certainly have included an immunity even for personal violence, threats, or intimidation. In 1825, an amending and qualifying Act was passed; by it, the combination laws indeed remained repealed, but two new offences, 'molestation and obstruction,' were created.

"The immunity of combinations of workmen established by the 1824 Act (making them no longer liable to be prosecuted as associations acting in restraint of trade, save for meetings to discuss wages or hours of work) was removed. Thus, after 1825, workmen might still be prosecuted for conspiring in combination.

"Conspiracy being thus the only combination liable to prosecution after 1825, the attention of the Courts was drawn more closely to its nature. Convictions for conspiracy with others to raise wages at common law before 1825 are

rare. But in 1832 members of trade unions were indicted for illegal combination under the 1825 Act, merely for writing to their employers that a strike would take place. In 1837 occurred the famous trial of the five Glasgow cotton spinners, for conspiracy, resulting in their conviction. In 1846, the officers of the Journeymen Steam Engine, etc., Friendly Society were indicted for conspiracy. The indictment contained 4,914 counts, and resulted in the conviction of nine of the officers. In 1856, Crompton, J., said that all combinations tending directly to impede and interfere with the free course of trade were not only illegal, but criminal.

'In 1859, an Act was passed defining more closely the statutory offences of molestation and obstruction created by the Act of 1825. It rendered peaceful persuasion to induce workmen to abstain from working, in order to raise their wages, lawful. In 1867, the Court of Queen's Bench, for the first time, distinguished between the criminal and civil aspects of combinations generally. 'I am very far from saying,' said Cockburn, C. J., 'that the members of a trade union, constituted for the purpose not to work, except under certain conditions, and to support one another in the event of being thrown out of employment, in carrying out the views of the majority would bring themselves within the criminal law, but the rules of the society would certainly operate in restraint of trade, and therefore, *in that sense*, be unlawful.'" [7]

Parliament continued to undo the work of the courts, and labour organisations have now secured an immunity from what were formerly criminal acts and have gained a general scope of action, which many thoughtful persons, not unfriendly to the wage-earner, regard with grave apprehension for the future of England. It is not by any means stated, therefore, that the law courts have been altogether wrong and Parliament altogether right; but simply that the individualism of the courts as well

as their conservatism has in the United States and elsewhere led them to take an attitude of antagonism first towards trade unions and later towards their natural incidents and accompaniments. And after all it is idle to claim that one is in favour of trade unions and then to take an attitude of antagonism to those things which are essential for trade unions. If we have trade unions at all, we must have an executive officer; this officer is frequently called a walking delegate. It is nonsense to say that we are in favour of trade unions but against the walking delegates. If we are to have a trade union at all, we must have some restrictions in regard to the employment of outsiders, rates of wages, etc., that is, we must have some common action. It should be noticed particularly that here we have one of the demands for which there is a struggle. There is a struggle on the part of capital for the right to make collective agreements; that is, to form trusts and combinations. There is on the part of the workingmen a struggle for collective agreement; they want to combine and have one person speak for them. This was one of the chief points at issue in the great strike in the engineering trade in England in 1897. It was shown very clearly in the position taken by the representatives and spokesmen of the working class at that time. In the report of a meeting of the Fabian Society the following resolution, proposed by Sidney Webb on behalf of the Executive, was unanimously adopted, *viz:*

"That this meeting of the Fabian Society expresses its sympathy with the Amalgamated Society of Engineers, and the allied Union in their present struggle, and calls the at-

tention of the Trade Unions throughout the kingdom to the importance of rallying in defence of the invaluable right of settling the conditions of employment by Collective Bargaining, now being called in question by the Federated Employers." [8]

A circular issued at the time by the Fabian Society lays the emphasis upon collective bargaining. It is said that

"The Engineers' dispute is no longer a sectional question of machinery or hours; it stands revealed as a gigantic conspiracy of organized capital to destroy the only social force, outside parliament, that has grown up to restrain and balance the enormous power of money in unscrupulous hands in our great national industries. The Federated Employers declare their determination to deprive English workmen of that right of Collective Bargaining which all employers claim and exercise as a matter of course for themselves." [9]

The purpose here is simply to show how vital the point at issue seemed to the friends of the engineers, and it is not now necessary to take any position with respect to the implications of this quotation.

A case decided against the trade unions in Boston and against the Mayor of Boston brings out the same point.[10] The Mayor had put into a contract for city work a provision to have the work done by the trade unions under trade union conditions. An account of this in the daily press is as follows:

"Boston, Jan. 27. Judge Richardson in the Superior Court has handed down a decision which is a blow to organized labor. The Mayor had suspended the contract on a new public building on the ground that the contractors did not give the preference to union labor, as is recommended in

all city contracts. Judge Richardson grants the injunction preventing further interferences by the city officials, saying that such discrimination in the employment of labor is not in accord with our ideas of equal rights and is hostile to that portion of the constitution of the United States that declares government to be instituted for the common good, and not for the profit, honor, or private interest of any one man or class of men." [11]

A letter issued by the Mayor of Boston in regard to this case before it was decided is included in the following quotation:

"In a recent issue of the *Labor Leader* the following letter from Mayor Quincy, of Boston, was published, which was brought forth by a protest from the master builders of that town in regard to the action of the Mayor in not awarding a contract to the lowest bidder. It marks a clear understanding of the reasons underlying trade union policies and it is evidence of the progress which the trade union is making in public esteem. It is as follows:

"'As you are doubtless aware, the representatives of the trade unions in this city have from its inception taken an active interest in the project for building a municipal bathing establishment for use all the year round. I stated in my annual address at the beginning of this year that, partly in recognition of such interest, a clause had been inserted in the form of the contract for building the Dover Street bath house requiring that the contractor shall give preference on the work to citizens of Boston and members of the several trade unions. This clause was inserted not only because it seemed to me that there were special reasons for doing it in this particular case, but also because I believe in giving a trial, at least, to the policy which it indicates.

" 'There has been for years much complaint on the part of wage-earners against the operation of the unrestricted contract system in the performance of public work. They have

argued that, while the proposition that high wages were in the public interest was generally accepted, the policy adopted by municipalities—differing widely from that of private individuals—of awarding contracts to the lowest bidder on unrestricted competitive bids inevitably tended to reduce the highest prevailing rates of wages in the trades affected.

" 'It is of great importance that municipal buildings should be so constructed as to last for a long period of time with a minimum amount of repairs. It will hardly be disputed that public buildings, constructed under the unrestricted contract system, have, by no means, been equal to the best buildings erected for business purposes by private individuals. The annual repair bill of the city of Boston is, as you are aware, a very large one. In my opinion it would not be as great if a better quality of building could have been secured in the erection of our public buildings.

"'I have, after a good deal of attention to the subject, come to the conclusion that it is neither good business nor good public policy for this city to continue to award its building contracts without any stipulation as to the character of the labor to be employed. The contracts for the largest office buildings recently erected in this city have been awarded, not to the lowest bidders, but to the best builders employing the best and most highly paid labor. While public bodies are obliged to invite open competitive bids—not because that is the best method of securing good work at the lowest fair price, but because it is the only way by which corruption or favoritism can be properly guarded against—they may yet protect themselves, as well as the wage-earners, from some of the evils of the system by inserting in contracts certain provisions as to rates of wages to be paid by the contractor.'" [12]

The courts have been against the insertion of a provision of that sort by the city on the ground that it favoured a class. According to American courts, in

general, contracts which are collective, if they are capitalistic in character, are very likely to be held to be in restraint of trade,—because in their nature they are very apt to contemplate price agreements, division of territory and regulation of common action—and although our courts have perhaps recently been more liberal with respect to collective labour agreements, there are numerous cases in which such agreements easily and naturally become conspiracies, for example, the case of boycott agreements and agreements not to work with non-union men. So we see that the ideal of our courts is the individual contract and not the collective.[13] But elsewhere we see decidedly varied ideas. Some look askance upon collective bargaining, and others believe in the right of men to agree together and make a bargain through one man. The question may be raised whether our courts are not perhaps more consistent in their individualism than Sidgwick. We can at least ask whether socialism is after all anything more than collective bargaining carried very far. This may be an extreme position to take, but certainly if we carry collective bargaining very far it would seem to point in that direction. For example, it does not always seem to be very difficult to take the step from voluntary boards of conciliation and arbitration to compulsory arbitration. New Zealand has taken this step (1894) and the Arbitration Court penalty is as much as £500 from an employer and £10 from an employee.[14]

A further word is necessary in this chapter, in regard to contract and individualism, unlimited. Unlimited individualism means a society organised by private

agreements solely, these agreements not to involve that enforcement of constraint of will found in true contract. There are those who in the main have held to the present order of society, but in certain particulars have favoured unlimited individualism, for example, with respect to the collection of debts. It has been a favourite thought with many that there should be no laws making possible the collection of debts. It has been said that if there were no such laws then the debts would be debts of honour.

But the anarchists go further still. They are unwilling to admit any constraint of wills at all. They say that true individualism is unlimited individualism, and we limit individualism when we compel a man to keep an agreement which he made yesterday or the day before. They do not admit that we have the right to make an exception to the general theory of individualism in order to secure stability and certainty. They say that if we make it a matter of faith and honour then we will have the best kind of a society. They deny (a) the right of enforcement of agreement; the state, they say, represents might only and has no ethical element. This, by the way, makes our scientific anarchism dangerous *per se*. To them their cause is right *versus* might, the might of government. They deny (b) the expediency; the state accomplishes evil, it oppresses by interference. Certain classes of agreements they believe would not be made; certainly if made, they would not be enforced, namely those cases whereby inequality of opportunity is secured—more particularly agreements for unearned rent income, capitalistic income, etc. And

if, even with the substitution of possession for private property and voluntary agreements enforced only by public opinion, inequalities in opportunities would still be brought out by such agreements, these they think would be comparatively minor matters.[15]

This brings us to "Criticism of the Individualistic Theory of Contract."

[1] P. 587. But we now have a new kind of chief executive and of legislators who are trying to extend logically the scope of protection of person and property; hence the hubbub!

[2] P. 588. Before the British Association for the Advancement of Science, quoted by F. W. Frankland in an article on "State Interference *v.* Individualism" in the *Monthly Review* of New Zealand, December, 1888.

[3] P. 588. Sidgwick, *Elements of Politics*, p. 83.

[4] P. 589. We are not giving the legal theory as it exists at any precise period of time or in any particular country, but the individualistic philosophy with which the legal theory, of course more or less accurately, coincides.

[5] P. 589. Written in October, 1907.

[6] P. 591. See Ritchie *v.* People, 155 Ill. 98 (1895). But in a later case [Ritchie & Co. *v.* Wayman, 244 Ill. 509 (1910)], they changed their position. In Gillespie *v.* Ill. [188 Ill. 176, opinion filed December 20, 1900], the court held unconstitutional a law making it a criminal offence for an employer to attempt to prevent his employees from joining a union or to discharge them because they belong to a union, as "being in contravention of the provisions of the State and federal Constitutions which guarantee that no persons should be deprived of life, liberty, or property without due process of law." It also held that it was special legislation in that it protected union men, but not non-union men. The court stated that it was against the Fourteenth Amendment of the United States Constitution and against sec. 2 of art. 2 of the Bill of Rights in the Illinois Constitution which states, "no person shall be deprived of life, liberty, or property without due process of law." The court then saw in this case no reason to make an exception to the general rule that the Constitution gives the right to make and terminate contracts.

In this connection special mention must be made of L. D. Brandeis's *Brief* incorporated in Josephine Goldmark's book, *Fatigue and Efficiency* (1912). Miss Goldmark did a large part of the labour of preparing this brief.

[7] P. 593. See book entitled, *Legal Position of Trade Unions* by

Henry H. Schloesser and W. Smith Clark, pp. 7–9. See also for English conditions, book on *Trade Union Law*, 3rd ed. 1913, by Herman Cohen; especially the chapters on "The Conspiracy and Protection of Property Act, 1875," pp. 146–172, and "The Trade Union Act, 1913," pp. 128–145.

[8] P. 595. *Fabian News*, November, 1897.

[9] P. 595. On the general subject see the monograph by Dr. Margaret A. Schaffner on *The Labor Contract from Individual to Collective Bargaining* (Bulletin of the University of Wisconsin, Economics and Political Science Series, Vol. II, No. 1, 1907).

[10] P. 595. This case is not found in the Massachusetts Supreme Court Reports. For a similar case, see Fiske *v.* People, 188 Ill. 206.

[11] P. 596. *Madison Democrat*, January 27, 1898.

[12] P. 597. From *Unity and Progress*, Philadelphia, March 31, 1897.

[13] P. 598. To avoid misunderstanding it is again repeated that this does not mean, of course, that collective bargaining is unlawful. It is not. The Pennsylvania miners bargain collectively for a stated period of time.

[14] P. 598. This applies only to registered and incorporated trade unions. (Lectures by Honourable W. P. Reeves, formerly General Agent for New Zealand, reported in *Fabian News*, November, 1897.)

For additional information regarding compulsory arbitration in New Zealand, see Reeves, *State Experiments in Australia and New Zealand;* Broadhead, *State Regulation of Labour and Labour Disputes in New Zealand;* Findlay, *Labour and Arbitration Act, 1909;* Clark, *The Labour Movement in Australasia; Parliamentary Debates*, Vol. 77, 79, 145; Macgregor, *Industrial Arbitration in New Zealand;* Aves, *Report on the Wages Boards and Industrial Conciliation and Arbitration Acts.*

[15] P. 600. A friend after reading the manuscript of this chapter wrote the author as follows:

"I find it impossible to take 'philosophical anarchism' as seriously as your argument here does. My imagination of 'voluntary organization' refuses to work after a certain point." The treatment of anarchism in the book is given briefly because it involves a logical extension of the ideas of limited individualism which in a past generation had tremendous power. As to anarchism itself, it can be refuted, first, by an examination of the nature and limitations of voluntary agreements, and second, by an examination of the nature and limitations of the idea possession as distinguished from property.

CHAPTER V

CRITICISM OF THE INDIVIDUALISTIC THEORY OF CONTRACT AND THE SOCIAL THEORY OF CONTRACT

A. *Criticism of the Individualistic Theory of Contract.* Legal equality in contract is a part of modern freedom. But we have legal equality in contract with a *de facto* inequality on account of inequality of conditions lying back of contracts. It is at this point that we must take up the work of reform everywhere, but particularly in the United States. In the absence of contract we have might, it is true; but with free contract unregulated we have also a prevalence of might and of different kinds of might, extra legal, lawless, and lawful might. We notice here, as already stated, that it is the strong and powerful especially who are the advocates of free contract unregulated and untrammelled. Free contract presupposes equals behind the contract in order that it may produce equality.

We observe then first of all:

I. Unequal conditions preceding contract as a basis of contract. Adam Smith's theory advocated free contract, but he wrote in an atmosphere created by the dominant theory of the essential equality of men.[1] While he may not have pushed so far as some of his contemporaries and successors the theory of natural

equality, and while he did speak here and there of differences in the natural aptitudes of men, he did suppose that if we could remove artificial restraints and restrictions upon men then the approximately equal natural powers among them would assert themselves and unregulated contract would mean equality and justice. It was by many held that if the environment of the bricklayer had been that of the statesman the bricklayer would have been the statesman and *vice versâ*. So when one considers men as really equal, especially as equal in powers and capacities, and looks upon the inequalities which we see about us, as the result simply of restraints and restrictions, then one must wish to remove these restrictions and allow free contract full play; although there are of course other aspects of the question. Some writers, for example, appear to take the position that on account of the restraints and restrictions existing in the past we have inequality in the capacities and power of men, and that we must have some regulation until we get back to natural conditions of equality. But we are unable to accept the hypothesis of equality as a natural condition. Pertinent is the statement of the late Professor Anton Menger of Vienna that "there is no greater inequality than the equal treatment of unequals." [2] This is clearly seen in contracts.

In the second place, we observe:

II. Actual legal inequality. Among the various ways in which men are legally unequal these may be mentioned: they are unequal first on account of an unequal knowledge of the law. If we have a law precisely the

same for all persons and some know the law much better than others, those who have the better knowledge of the law have a position of legal superiority. We are not asking whether or not this is something for which men are to blame. This fact makes a great difference between the rich and the poor, and especially between the great private corporation and the individual,[3] between combinations of capital and combinations of labour. It is shown in the struggles between combinations of capital and of labour, because the combinations of capital have at their service continually the best legal talent in the country, and the combinations of labour can by no possibility have equal legal talent at their service. They have not the same means and capacity. Most lawyers would much rather serve a corporation than a labour organisation, and very rightly, from the standpoint of their own interest. The result is that substantially the same sort of thing can be done by both, but when it is done by one it is legal, and when it is done by the other it is illegal, perhaps on account of the non-observance of certain forms; and this is because the two parties have unequal knowledge of the law.

In the second place this legal inequality is seen in the unequal protection afforded to the rich and the poor by the law. This is because the poor have not the means to avail themselves of the protection of the law even if they have an equal knowledge of the law. This is so much the case that it has been necessary to organise institutions for the special purpose of helping the poor to secure justice. As an illustration of this we have the Chicago Legal Aid Society and similar organisations in

New York City, in Albany, and elsewhere. These have improved conditions greatly, but inequality of this sort still exists.

Then in the third place we have inequality in the law itself. A fine means one thing for a poor man and another thing for a rich man. A rich man will pay a $50 fine and think little about it. Very likely he gives an assumed name and nothing is ever heard about it.[4] A poor man goes to jail for thirty days and his reputation is perhaps ruined. Lawyers have already called attention to this situation. It may be impossible to remedy it completely, but the first thing to do is to acquaint ourselves with the facts.

There may be crimes of such a character that one class of men will be peculiarly likely to commit these crimes and to suffer punishment, and there may be similar crimes to which men of another class are peculiarly exposed. Now if we provide a punishment of one kind for crimes of the first sort, and an entirely different punishment for crimes of the second sort, we have legal inequality although we have nominal equality. Boycotts and blacklisting are two crimes precisely similar in their essence. If the law says that anyone guilty of boycotting is subject to such and such punishment it appears to be equal whether it applies to the workingman or to the employer. But if we find out that it is the employees who are guilty of boycott and the employers who are guilty of blacklisting and that the penalty is ten times as severe for boycotting as for blacklisting then we have inequality in the law. And such is the case. The penalty for blacklisting may be

$50, and the author does not know that anyone has been fined more. The president and the superintendent of the New York and New Haven railway, several years ago, were brought before the court for blacklisting and each one was fined $50. About the same time a poor man found guilty of boycotting was sent to prison for forty-two months.

Take also the matter of accidents to passengers and to employees. If we have a radically different penalty in the law pronounced against a railway company for accidents to passengers from that for accidents to employees we have an actual inequality, because for the most part the passengers will be from one class and the employees from another class.[5] This is true even if we admit, as we must, that there are some very obvious grounds for a certain discrimination between employees and passengers.

Then we have, fourth, the legal inequality which results from unequal administration of the law, or the way in which it is brought to bear upon different classes even when the law itself is the same. Attention has been called to this from time immemorial. It is brought out in Shakespeare's *King Lear*, where we read the following words:

> "Through tattered clothes small vices do appear;
> Robes and furr'd gowns hide all,
> Plate sin with gold,
> And the strong lance of justice hurtless breaks;
> Arm it in rags, a pigmy's straw doth pierce it."

In the fifth place we have the failure to provide laws which the poor need, because every law represents a

social force, and the poor have not the same social force which will enable them to secure law. Thus we see frequently how easy it is for great companies to secure the laws needed for their protection, and how difficult it is to secure the laws which the poor need. The Chicago Legal Aid Society has been trying, as the former Chicago Bureau of Justice tried for years, to secure laws needed for the poor and it has made little progress. But the trend at the present time is in the direction of equality; at times perhaps toward a thoughtless and sentimental inclination to yield to unwarranted claims of the poor.

Then in the sixth place we have legal inequality on account of corrupt means of defeating the ends of justice which the powerful classes have at their command to a greater extent than the poor.[6] But happily few instances are found of corruption of courts and instances of actual corruption of legislative bodies are becoming rarer.

There are, then, these six ways in which we have a manifestation of legal inequality, even when the law itself may seem to be very nearly equal for all classes. Here as elsewhere the state is the organ of freedom. The original and primal restrictions on freedom spring largely from outside the state.[7]

Fortunately decisions of American courts can be cited which show a recognition of this truth. Opinions in the cases of Peel Splint Coal Co. *v.* State, 36 West Va. 802, and Harbison *v.* Knoxville Iron Co., 183 U. S. 113 may be instanced. These cases are very suggestive on the right of the state to interfere with the alleged

freedom of contract where its real interests are involved. In these cases the right is sustained largely upon the theory that unrestrained freedom of contract has resulted in bloodshed and disturbances and that the state has the right to protect its own peace and general welfare. While the public peace is brought forward as the ground of interference, the outcome is that demanded by economic theory. Moreover, we find in these cases a clear concession on the part of the courts that the miner who has to work for a daily wage or starve is not on a contractual equality with his employer.[8]

III. We observe as our third main head the existence of class legislation, for the question of class legislation arises very frequently in connection with contracts; that is, with laws regulating contracts, etc. We cannot go very far in our discussion unless we have some clear idea as to whether or not we do have classes in society. It is claimed by some that we have no social classes in the United States. Nothing can be more contrary to the facts of the case than this statement. What do we mean by a class? Let us take the *Century Dictionary* definition of a class: "An order or rank of persons; a number of persons having certain characteristics in common, as equality in rank, intellectual influence, education, property, occupation, habits of life," etc. Now if this is a correct definition of a class we certainly do have classes in the United States as well as in every other country, and this is of necessity so. We have orders of persons with interests in common, with equality in rank, intellectual influence, and with suffi-

cient equality in occupation and habits of life. Johnson's *Dictionary* [9] gives us this: "We are by occupations, education, and habits of life divided almost into different species. Each of these classes of the human race has desires, fears and conversations, vexations and merriment peculiar to itself." Daniel Webster said, "nine-tenths of the whole people belong to the laborious, industrious and productive *classes*." Macaulay in his *History of England* says: "The Constitution of the House of Commons tended greatly to promote the salutary intermixture of *classes*. The Knight of the Shire was the connecting link between the baron and the shopkeeper." [10]

So we might take up other definitions such as are found in Webster's *Dictionary* or in any other dictionary of any kind, and we shall find classes defined in such a way that their existence is unquestionable. We find groups of persons with certain common characteristics and common interests, certain common ways of looking at things and we can distinguish one class from another. The farmers have characteristics of their own by which they may be distinguished, likewise the merchants, the skilled mechanics, and the unskilled mechanics. Each class has its peculiar traits and its own point of view. Or we may take groups of classes which form larger classes. Take the great classes comprised of many subclasses, employees and employers, labourers and capitalists. If during a great strike we read the newspapers devoted avowedly to the support of the wage-earners and then if we read the ordinary newspapers we find ourselves in two very different worlds. The point of

view of one class is contrary to that of the other class. Modern classes are chiefly industrial, particularly so in a republic like the United States, but industrial pursuits are everywhere acquiring increasing importance in class formations. It is absurd to talk as if the law were the only social factor and as if there were no social classes in the United States because there are no classes created directly by law. Ancient classes were largely created thus but even these continuing to-day in such countries as Great Britain and Germany, were not so exclusively the product of law as is generally supposed. On the contrary, law often did little more than recognise existing social classes which were brought about by differences of pursuits and help perpetuate existing class formation. Sir Henry Maine in his studies on Indian life and institutions has shown that the chief original factor in the creation of castes in India was occupation. The castes of India were, he said, for the most part social and industrial classes hardened into castes by custom and law. The titles of the nobility to-day point to the origin of social rank in occupation—marquis and margrave, duke, marshal—all point to a kind of service or occupation, the title remaining after its original signification has disappeared.[11]

We now pass on to

IV. What constitutes freedom? We say that contract carries with it freedom, or we say that it restricts the violation of freedom. Now what do we mean by freedom? The late Thomas Hill Green treats the subject very excellently in his article on "Contracts."

"Freedom rightly understood is the greatest of bless-

ings"; but, he asks, "what do we mean by freedom? We do not mean," he says, "merely freedom from restraint or compulsion. We do not mean merely freedom to do as we like irrespective of what it is that we like. We do not mean a freedom that can be enjoyed by one man or one set of men at the cost of the loss of freedom to others. When we speak of freedom as something to be highly prized, we mean a positive power or capacity of doing or enjoying something worth doing or enjoying, and that too something that we do or enjoy in common with others. We mean by it a power which each man exercises through the help or security given him by his fellowmen, and which he in turn helps to secure for them. When we measure the progress of a society by its growth in freedom, we measure it by the increasing development and exercise on the whole of those powers of contributing to social good with which we believe the members of the society to be endowed; in short, by the greater power on the part of the citizens as a body to make the most and best of themselves."

Freedom, then, is something positive, and is a social product, a social acquisition. It is admitted that there can be no freedom of men who act not willingly but under compulsion. Nevertheless, says Green, "the mere removal of compulsion . . . is in itself no contribution to true freedom." Perhaps this is too strong a statement, yet his idea is a correct one. The freedom of savagery is not true freedom. It gives not strength but weakness. The powers of the noblest savage are not equal to those of the humble citizen of a law-abiding state. We have in this freedom of savagery a slavery

to nature, which can only be removed by submission to social restraint through which true freedom is acquired.

Freedom of contract is only valuable as a means to an end, and that end is "freedom in the positive sense: in other words, the liberation of the powers of all men equally for contribution to a common good. No one has a right to do what he wills with his own in such a way as to contravene this end." "Positive freedom consists in an open field for all men to make the best of themselves." Here is a positive and constructive concept of freedom as opposed to the negative idea of freedom. Freedom is not just a mere form, but is a form or vessel to be filled in.[12]

Here are various definitions of freedom:

"Liberty ought to be . . . the ability to choose between various means of doing good. If you enthrone it alone, as at once means and end, it will lead society first to anarchy, afterward to the despotism which you fear." [13]

The French Revolution affords a good illustration of this,—of putting up freedom as an end in itself, merely removing restraints. In that case we did have first a condition of anarchy and then despotism. What else can we expect of modern anarchism, should it ever become a real power?

We quote also what is said on freedom by the Rev. Robert Ottley in the work *Lux Mundi*, in his essay on "Freedom in Christian Ethics." He says: "If man stands in a real relation to the good, his true freedom can only mean freedom to correspond with and fulfil the law of his nature." (p. 474). Then speaking of the crude

idea of freedom as man's power "to do as he likes," he says, "True liberty can only mean freedom from false dependence." (p. 475). "From this point of view sin—the false claim to independence—is simply wrong self-love."

As we are trying to show the thoughts of the able men of the age in various countries and occupations, it is well to consider the ideas of still others. Let us now observe Fairbairn's definition in his *Religion in History* (p. 223).

"Liberty is of two kinds, political and religious. Political liberty is revealed in the highest and most perfect degree where the people have the right absolute to make and to amend their own laws. Religious liberty is realized where every citizen possesses the right to judge in religious matters, and to determine the faith or the religion by or after which he shall order his life."

W. S. Lilly says:

"Liberty means the power of a man to make the most and the best of himself; to develop fully his personality. . . . Private property is realized liberty. It is, in its first idea, the guarantee to an individual person of what has been wrought, through the exercise of his personality, by labour and abstinence. It is essential to the development and maintenance of personality in this work-a-day world."[14]

Just a word or two from Schäffle, found in his work on the *Hopelessness of Socialism*.[15] He says:

"True freedom or liberty is the unlimited development of individuality in the immediate or mediate service of society in accordance with one's own powers and that right relationship between service to the community and the good received from the community."

It is then the unlimited unfolding of individuality in the service of society. The one who thus serves society in accordance with his powers receives protection and there is a right relation and correspondence between the service to society and the commodities and services received from society. Schäffle says that this position must be secured to the industrial proletariat, "which serves society under the leadership of capital, while capital must be placed in the position of an organ of production under obligation to society. This is the true, the real and only genuine freedom which must be looked upon as supplementary to capitalism."[16]

A remark of Professor Wagner's in regard to freedom of contract is also noteworthy. Wagner pronounces it to be a fiction, because private capital, landed property, and the laws of inheritance are taken for granted; and these lie back of demand and supply and back of contracts through which demand and supply operate. If distribution brought about by "free contract" (competition) is just, this implies that the fundamental institutions of property and person are likewise just, so these latter, he maintains, must be examined.[17]

B. *The Social Theory of Contract.*

In opposition to the individualistic theory of contract, we place what we designate as the *social theory of contract: contract is established and maintained for social purposes.* All contracts find their logical origin in the social welfare and in this they find the grounds for their maintenance.[18] This theory of contract is analogous to the social theory of property. We may say in fact it is substantially the same thing if we take the view of

American courts that the right to contract is a property right. The proofs are similar to those given in the case of property. Contract has its individual side and its social side, but the social side is dominant and controlling and contracts of far-reaching significance are determined in their character by the legislative power while our courts constantly set aside contracts as contrary to public policy. One has but to reflect upon the significance of the Sherman law in the United States to realise this; for vast corporate enterprises covering the entire country find that their contracts must be based upon the provisions of this law. Powerful combinations like the Standard Oil and Tobacco trusts are broken to pieces because they have made contracts in restraint of trade in opposition to the Sherman law. And we have further limitations of contract in the entire protective labour legislation of modern times.

Contract finds its limitations in the social welfare, and as time goes on less and less hesitation is felt in drawing the line beyond which contract must not go. With increasing frequency our legislatures and our courts establish metes and bounds of contract. Story says in his work on *Law of Contracts:* [19]

"The rule of law, applicable to this class of cases, is, that all agreements which contravene the public policy are void, whether they be in violation of law or of morals, or tend to interfere with those artificial rules which are supposed by the law to be beneficial to the interests of society, or obstruct the prospective objects flowing indirectly from some positive legal injunction or prohibition."

Nevertheless, on account of false ideas of freedom,

courts are less advanced in recognising the social theory of contract than in recognising the social theory of property. The ideas of the judges are more rigid when it comes to the social control of contract. They allow the constitutionality of laws which impose a real burden on property but at times set aside laws which regulate contract as to hours of labour, the means of payments, etc. as shown elsewhere in the present work, although these laws impose slight burdens and often in the end, when allowed, promote the welfare of all, employer, employee and society at large.

The social control of contract has advanced so far in Australia that one of the regular headings in the Official Year Book of the Commonwealth of Australia is now "Legislative Regulation of Wages and Terms of Contract," [20] while the actual land legislation of Great Britain and Ireland for Scotland and Ireland, and that now proposed for England as a cure for the evils of tenancy, allows almost unlimited interference with private contract in order to promote what is regarded as the general weal.[21]

The rapid progress even American courts are making in the recognition of the social theory of contract is illustrated by their treatment of assumption of risk as a defence where negligence is a breach of statutory duty. If a statute imposes a duty to provide safety appliances and makes the employer who fails to do so criminally liable, he cannot contract out of this liability.[22] But the chief point for the economist and the sociologist is that the courts recognise that society has the dominant interest; and thus they work away from

that individualism which has done so much harm in the past. In conclusion it is not possible to do better than to quote from an excellent note on this subject which appeared in a recent issue of the *Harvard Law Review:*

"If the right of the individual to recover involves only his personal interest he may consent to give it up. But if society has an interest in the right then the consent of the individual cannot destroy the right. Thus a householder cannot waive his exemption because of the social interest that he and his family be not reduced to poverty. An insurance company cannot waive a lack of insurable interest because of the danger to society in tempting the beneficiary to destroy the life or chattel in which he has no interest. The importance which the doctrine of assumption of risk acquired in the nineteenth century is an example of the individualistic theory of justice on which the common law of that period proceeded, allowing each man to work out his own salvation. But statutes prescribing criminal liability for failing to guard machinery are enacted to protect the interest which society has that its members be not maimed. The principal case, in overruling an earlier New York decision construing the same statute, illustrates the increasing inclination of the courts to-day to recognize this interest of society. The employee's consent by an assumption of the risk to give up a right involving such an interest should not be effective whether such consent be worked out contractually or otherwise." [23]

Notes and References to Chapter V

[1] P. 603. See Cannan's edition of the *Wealth of Nations*, p. 17, also his edition of the *Lectures* of Adam Smith, pp. 169–70. The following quotation from Adam Smith's friend and contemporary, David Hume, illustrates further the extent to which this philosophy of equality pervaded the thought of the time:

"When we consider how nearly equal all men are in their bodily force, and even in their mental powers and faculties, till cultivated by education; we must necessarily allow, that nothing but their own consent could, at first, associate them together, and subject them to any authority. The people, if we trace government to its first origin in the woods and deserts, are the source of all power and jurisdiction, and voluntarily, for the sake of peace and order, abandoned their native liberty, and received laws from their equal and companion." (*Essays, Moral, Political and Literary*, ed. T. H. Green and Grose, Vol. I, pp. 444–5.)

[2] P. 604. "Man weiss eben heute, dass es keine grössere Ungleichheit gibt, als das Ungleiche gleich zu behandeln."—*Das bürgerliche Recht und die besitzlosen Volksklassen*, 4to Aufl. 1908, S. 30.

The thought is very old. We find, indeed, a similar but not entirely identical idea in Aristotle's *Politics* (III, 9, § 1), where he says: "Justice is thought . . . to be and is equality; not, however, for all, but only for equals. And inequality is thought to be, and is, justice; neither is this for all, but only for unequals." (Jowett's Translation.)

[3] P. 605. At the same time it is true that to-day the advantage is not always with the private corporation. In the present reaction of sentiment against the abuses of corporate power, there is an unwarranted prejudice against the corporation as such. It is now doubtless true that private corporations are prosecuted for doing things which individuals do with impunity. The greater conspicuousness of the private corporation is frequently a disadvantage.

[4] P. 606. It has been proposed to make all laws imposing fines read so many days' earnings and not so many dollars. This idea may not

be altogether a bad one, but it is not practicable in this form. The judge imposing the fine might be allowed a large discretion with the purpose of making the fine mean the same thing to different delinquents so that there should be equality of sacrifice. But in this case the fines for the very rich would be so large as to yield very considerable sums, and in this way we would encounter an old historical danger of which we were conscious when we passed that provision in our Federal Bill of Rights (the first ten amendments of the American Constitution) prohibiting excessive fines.

An American judge adds the following in a communication to the author: "But is not the ability of the defendant to pay the real test of an excessive fine? I am inclined to think that this is the attitude that the majority of the American courts would now take, even if they have not done so in the past." This view would warrant very heavy fines, even amounting to hundreds of thousands and possibly millions of dollars. History shows that it is dangerous to enrich the public treasury in this way; and it may be doubted if anywhere it is more dangerous than in a democracy.

[5] P. 607. George Brandes, writing of the unique style of Anatole France, uses these words: "Others have said, when inequality is found in the law itself, what is left of equality? But Anatole France alone could have written this, 'In the majesty of its equality, the law forbids to rich and poor alike to sleep under bridges, to beg on the streets, and to steal bread.'" "Anatole France," by George Brandes, in *Die Literatur*, herausgegeben von George Brandes, Deutsch von Ida Anders, p. 3.

[6] P. 608. F. A. Lange treats excellently the question of legal inequality which exists under conditions of nominal equality, in his work *Die Arbeiterfrage* (4th ed., 1879, p. 382 *et passim*). On p. 382 he says the following, as a part of his programme for the solution of the labour question: "Es muss mit einem Worte die Rechtsgleichheit, die bis jetzt nicht viel mehr als eine Phrase ist, in die Wirklichkeit übergeführt und in allen einzelnen Zweigen des öffentlichen Lebens ausgeprägt werden." The writer has the impression that somewhere in Lange he has seen an enumeration of the kinds of legal inequality somewhat similar to that given in this chapter; but if there is such an enumeration he has been unable to find it at the present time.

[7] P. 608. In the case of Adair *v.* U. S. (208 U. S. 161), decided

January 27, 1908, the constitutionality of sec. 10 of the Erdman Act of June 1, 1898, making it a criminal offence for a carrier engaged in interstate commerce to discharge an employee simply because of his membership in a labour organisation, was called into question; and Mr. Justice Harlan of the Supreme Court held this section of the law to be unconstitutional on the ground that it was an invasion of personal liberty as well as of the right of property guaranteed by the Fifth Amendment of the Constitution, and that it was repugnant to the provision that no person shall be deprived of liberty or property without due process of law. He stated that it had no direct relation to interstate commerce; besides, the power to regulate interstate commerce "while great and paramount, cannot be exerted in violation of any fundamental right secured by other provisions of the National Constitution" (p. 161, syllabus).

Mr. Justice Holmes, dissenting, held the following view:

"The section is, in substance, a very limited interference with freedom of contract. . . . It does not require the carriers to employ any one. It does not forbid them to refuse to employ any one, for any reason they deem good. . . . The section simply prohibits the more powerful party to exact certain undertakings, or to threaten dismissal or unjustly discriminate on certain grounds against those already employed. . . . I confess that I think that the right to make contracts at will that has been derived from the word liberty in the amendments has been stretched to its extreme by the decisions; but they agree that sometimes the right may be restrained. When there is, or generally is believed to be, an important ground of public policy for restraint the Constitution does not forbid it, whether this court agrees or disagrees with the policy pursued. It cannot be doubted that to prevent strikes, and, so far as possible, to foster its scheme of arbitration, might be deemed by Congress an important point of policy. . . . I could not pronounce it unwarranted if Congress should decide that to foster a strong union was for the best interest, not only of the men, but of the railroads, and the country at large" (p. 191).

Mr. Justice Holmes thus goes to the heart of the thing. The provision is as much connected with interstate commerce as a multitude of other things allowed. The real question is the coercion of economic forces and this Mr. Justice Holmes recognises and he says that Congress may attempt to protect classes in the community

against this, thereby defending liberty. He has the positive, constructive conception.

It should be noticed that Mr. Justice McKenna also dissented from the decision given.

Apropos of the inequality caused by the freedom of contract, Dean Bigelow, of the Law School of Boston University, in his address on the opening day of the school year 1906–07, said:

"Nay, let us come nearer home and put ourselves at the crisis of our own national birth, when it was proclaimed that all men are born equal. This was the preaching of the economists of England from Bentham on, and prevailing here as well as there brought in the era of equality, along the line of which all our decisions and statutes proceeded to run. But putting ourselves there, we shall note another idea proclaimed by the same set of men, with if possible still greater emphasis; to wit, freedom of contract, along which line also our decisions and statutes proceeded to run. With what result? Let the controversy of last winter and spring in Congress, and the controversy still going on throughout the country, give answer. Freedom of contract proved the worst kind of delusion; it ran to gigantic monopoly and threatens to-day, whether for good or for ill I am not concerned as a teacher of law to say, the whole fabric of equality. Was freedom of contract a development of unfree contract, which the economists tore down? The economists made a great mistake in their dogma of freedom of contract, a mistake which has precipitated another conflict, at the crisis of which we now stand, trembling at the possibilities even while we notice the new economists discarding the old error and trying to save the day." Leaflet, "School of Law."

[8] P. 609. See article on Anthracite Coal Industry, VII *Michigan Law Review*, pp. 638–642, June 1909, by Mr. Justice Andrew A. Bruce.

[9] P. 610. As quoted by the *Century Dictionary*.

[10] P. 610. All from the *Century Dictionary*.

[11] P. 611. See *Village Communities*, p. 57.

[12] P. 613. Green, *Miscellaneous Works*, Vol. III, pp. 365–386.

[13] P. 613. Mazzini, *Rights and Duties*, Publications of the Church Social Union, No. 5, pp. 9, 10.

[14] P. 614. In an article in the *Fortnightly Review*, November 1, 1895, entitled "Illiberal Liberalism."

[15] P. 614. Sonnenschein Social Science Series.

[16] P. 615. "Die wahre Freiheit ist unbeschränkte Entfaltung der Individualität im unmittelbaren oder im mittelbaren Dienste der Volksgemeinschaft gemäss den besonderen Anlagen, mit Schutz vom Ganzen, mit Verhältnissmässigkeit zwischen der Leistung an die Gemeinschaft und dem Zufluss materieller und ideeller Güter aus der Gemeinschaft. Diese Stellung muss auch dem industriellen Proletariate, welches unter Leitung des Kapitals dem ganzen dient, verschafft und das Kapital in die Stellung eines der Gesellschaft verpflichteten Organs der Produktionsführerschaft gebracht werden; das ist die wahre, beglückende, allgemeine Freiheit, die positive Ergänzung des Kapitalismus." Schäffle's *Aussichtslosigkeit der Sozialdemokratic*, p. 48.

[17] P. 615. Wagner, *Grundlegung*, 3d ed., Pt. II, pp. 244–5.

[18] P. 615. Mr. Justice Holmes has repeatedly pointed out that the historic origin of contract is to be found in different specific cases which would have led to different theories and between which there was a struggle for life. See 12 *Harvard Law Review*, pp. 447–449, 1899; 25 (Eng.) *Law Quarterly Review*, p. 413, 1909.

[19] P. 616. Story, *Law of Contracts* (5th ed. by Melville M. Bigelow, 2 vols. Boston, 1874), Vol. I, p. 649, § 674.

[20] P. 617. See Year Book of the Commonwealth of Australia No. 6, 1913, pp. 1030–1040.

[21] P. 617. See Mr. Lloyd George's Land Speech at Swindon, October 22, 1913. Printed in the *Times* and other English newspapers, also separately by the *Daily News and Leader*.

[22] P. 617. Fitzwater *v.* Warren, 206 N. Y. 355 (1912).

[23] P. 618. Citing Ga. Code, 1911, par. 10; Moxley *v.* Ragan, 10 Bush (Ky.) 156 (1853); Sadlers Co. *v.* Badcock, 2 Atk. 554 (1743); Monteith *v.* Kokomo Wood Enameling Co., 159 Ind. 149, 154, 64 N. E. 610, 611 (1902); Lore *v.* American Manufacturing Co., 160 Mo. 608, 621, 61 S. W. 678, 682 (1901); 20 *Harv. L. Rev.* 111; Knisley *v.* Pratt, 148 N. Y. 372, 42 N. E. 986 (1896); Smart *v.* Smart (1892), A. C. 425, 432. See article "Assumption of Risk as a Defense where the Negligence is a Breach of a Statutory Duty," in *Harvard Law Review*, Vol. XXVI, No. 3, pp. 262–264, January, 1913.

APPENDIX TO CHAPTER V

The following are among the notes and quotations made by the author in the preparation of this chapter. They are inserted in this appendix simply as notes for consideration.

Liberty, Problem of

Tyranny of trade union *v.* increased control over social and economic forces. How much individual liberty of action shall a man abandon for greater abundance of material wealth? And another closely related question is this: Must a man give up the idea of liberty and opportunity in his vocation and outside of this vocation seek opportunities for personal unfolding? Must a man throw away his working time for the sake of the time remaining?

Liberty, Industrial

Charles Dunoyer, in his *Liberté du Travail,* has a penetrating and illuminating discussion of the nature of liberty and the conditions of its growth. His Book One (Livre Premier) in which he explains what the word liberty means to him deserves especial consideration from those who are concerned with this problem in its scientific and practical aspects. To him liberty means positive, constructive power and it develops and expands with the progress of civilisation. The theory of a free state of nature from which man emerges into civ-

ilisation by a sacrifice of a portion of "natural liberty" is shown to be a fiction which is the exact opposite of the truth. Best of all in his Book One is the third section, in which Dunoyer critically examines various current conceptions of liberty. See Dunoyer's *Liberté du Travail* (2 vols., Paris,) Vol. I, pp. 32–49, but especially pp. 42–47. *Cf.* Wagner, *Grundlegung*, 3d ed., Pt. II, p. 10.

Notice this verse of a religious hymn:

"In thine own service make us glad and free." Liberty dependent on disposition,—the right disposition.

Liberty

"Der Tod meines lieben Vaters veränderte meine bisherige Lebensart. Aus dem strengsten Gehorsam, aus der grôssten Einschränkung kam ich in die grôsste Freiheit, und ich genoss ihrer wie einer Speise, die man lange entbehrt hat. Sonst war ich selten zwei Stunden ausser dem Hause; nun verlebte ich kaum einen Tag in meinem Zimmer. Meine Freunde, bei denen ich sonst nur abgerissene Besuche machen konnte, wollten sich meines anhaltenden Umgangs, so wie ich mich des ihrigen, erfreuen; ôfters wurde ich zu Tische geladen, Spazierfahrten und kleine Lustreisen kamen hinzu, und ich blieb nirgends zurück. Als aber der Zirkel durchlaufen war, so sah ich, dass das *unschätzbare Glück der Freiheit nicht darin besteht, dass man alles tut, was man tun mag und wozu uns die Umstände einladen, sondern dass man das ohne Hindernis und Rückhalt auf dem geraden Wege tun kann, was man für recht und schicklich hält, und ich war alt genug, in diesem Falle ohne Lehrgeld zu der schönen Ueberzeugung zu gelangen.*"

Goethe's *Sämmtliche Werke,* Jubiläums-Ausgabe in 40 Bänden, Vol. XVIII, *Wilhelm Meisters Lehrjahre,* pp. 160–161.

Liberty

"Men are free to do what is reasonable according to the predominating social ideal." Bigelow's *Centralization and the Law,* p. 164.

CHAPTER VI

CONTRACTS FOR PERSONAL SERVICES WITH SPECIAL REFERENCE TO THE LABOUR CONTRACT [1]

Certain peculiar characteristics of labour manifest themselves in labour contracts and should be taken into account in legal decisions concerning these.[2] Labour is inseparably connected with the personality of the worker; and from this condition spring the peculiar characteristics which we have just mentioned. The workman must give himself when he gives his work. Thus there is a great difference between labour and, let us say, wheat as a commodity. Wheat is sent from buyer to seller, but the man who sells the labour of his hands cannot dispose of this apart from himself.

This connection of labour power with the labourer gives the purchaser "power over vital functions which he does not buy." [3] The fact that the function of working is bound up with the rest of a human personality gives the purchaser control over other parts of the worker's life than those which he has directly bought. Mrs. Sidney Webb has said: "The wage-earner does not, like the shopkeeper, merely sell a piece of goods which is carried away; it is his whole life which, for the stated sum, he places at the disposal of his employer. What hours he shall work, when and where he shall get his

meals, the sanitary conditions of his employment, the safety of the machinery and temperature to which he is subjected, the fatigues or strains which he endures, the risks of accident or disease which he has to incur,—all these are matters no less important to the workman than his wages. Yet about the majority of these vital conditions he cannot bargain at all." [4] Hobson adds to this statement, "The necrosis of the phosphorus match maker and the phthisis of the Belfast linen spinner are not part of any bargain and are not paid for."

Another consequence of this inseparable connection between labour power and the labourer is that, as the worker must sell his work where he happens to be, the employer at times attempts to prevent him from leaving one place in order that he may try to make a more advantageous bargain elsewhere. This was perhaps most systematically done by the English Poor Law under the Law of Settlement, which made it impossible for a workman to move into another parish unless he could give a guarantee that for a year and a day he would not be a burden on the poor rates. If he were unable to do so he was obliged to remain in the parish where his settlement was. Adam Smith said that there was hardly a workman in all England who had not suffered from this law.[5]

When labour power is bought and sold, the seller is generally weaker than the buyer. There are many reasons why this is so. In most cases the purchaser of labour power has relatively large resources, and the sale is more pressing than the purchase. Compare this with the sale of land or of goods. It is possible, and sometimes

even desirable, to hold back land or goods for longer or shorter periods—sometimes even for years—but a man who offers labour for sale generally depends for his immediate subsistence upon the sale of that labour. A man who offers land has, in addition to this, his labour power. The labourer must sell his power of working; if he cannot get work, he will soon starve. But the man who owns land may withhold it from sale and make a living by working on it.[6] "This labour power," says Hobson, "must be sold continuously; it must be sold in small quantities, commonly measured by the day or by the week; finally it must be sold to a buyer who knows the necessity under which the seller stands to effect a sale. In a word, the labourer is selling his labour power under the conditions of a forced sale." [7] The inferiority of the seller is such that the buyer is usually able to dispense with "higgling" or bargaining. He fixes the price, and the seller has only the alternative of accepting or refusing outright. An employer knows that for every single job he has to offer, several applicants will frequently be found; whereas an employee does not even in prosperous times meet with several competitors for his labour.

When an employer has many employees, it is generally of small importance to him whether he gets a particular labourer or not; and this holds good more particularly with regard to tasks which require little or no special skill, so that a man who falls out can easily be replaced. On the other hand, it is much more frequently of the highest importance to a labourer, whether or not he gets a particular job.

As the demand for labour decreases, the supply may

increase. This happens because, when wages fall and employment slackens, the wives and children of the workers try to earn something in order to keep the home together. In such times of stagnation, when the demand for labour is falling off, each class of workers receives accessions from the class immediately above: on the other hand, when the demand for labour begins to grow stronger, the good effect of this is not always felt at once, because in many countries there is a reserve army of unemployed and wages will in many cases not begin to rise until these men have all been supplied with work.

It is also possible, unless this is prevented by legislation or otherwise, for an employer to withhold wages in order to promote dependence. Akin to this is the truck system of payment in kind, which is so obviously bad from the worker's point of view that in many countries it is forbidden by law.

A workman's associates are chosen for him. This plainly shows the influence of the employer over the intellectual and moral, sometimes even the religious life of his employees. It may be held a criminal act for a man to say he will not work with another. Blacklisting and the ironclad oath illustrate the inferiority of the worker in the labour bargain, for nothing like an ironclad contract has ever yet been forced upon an employer by employees. Workmen have rarely been in such a position that they could say to their employers, "We will not work with you unless you give up your membership in the federation of railways," etc.[8]

Again, the cumulative effect of a series of bad bargains may be noticed. One bad bargain in the labour

market weakens the position of the worker and is apt to lead to others.

Adam Smith stated long ago that one reason why the labourer is at a disadvantage, in comparison with the employer, is that employers tacitly or openly combine together to keep down wages, whereas labourers compete with each other when unorganised. While the employer is to this extent exalted above the sphere of competition, even the comparatively well-off among the working class are affected by the competition of those who sell their labour under the direct pressure of necessity. Thus the necessities of the poor influence those who have resources. This statement refers to the condition of unorganised labourers; let us now suppose that labour has reached such a pitch of organisation that a fund has been collected which enables labour power to withhold itself from sale for a time. Even in this case, the position is that of accumulated wealth against accumulated wealth.

The situation, from the point of view of labour, may be summed up thus: in the older countries of the world generally, a low-skilled worker is at such a disadvantage in the labour market that he is normally only able to earn a bare subsistence. To place the marginal labourer or the weakest bargainer of this class on an equality with the marginal employer, says Hobson, it would be necessary "(a) to guarantee to him and his family a full wage of economic efficiency as an alternative to the acceptance of a competitive employment," and (b) to "safeguard him in the giving out of labour power against conditions of work which impair his effi-

ciency for future work." What does Hobson mean by this statement? When we have true net interest on capital, we have an amount in addition to the sum necessary for the maintenance of capital. We do not have net interest when we have gained from capital merely an amount sufficient to keep the fund intact. If we have 3 per cent. net interest, this means that we have 3 per cent. in addition to the sum which covers the risk run and the cost of maintenance. In the case of concrete capital, such as a building or a factory, the owner has to pay for repairs and any additional cost of depreciation, before he can reap any interest on his capital.

Applying this idea to wages, it becomes clear that a bare subsistence wage is not enough. This subsistence fund, says Hobson, must be guaranteed before labour can be considered on an equal footing with capital, because it should act as the alternative to the acceptance of competitive employment. And if the worker is to be safeguarded against the necessity of accepting work on disadvantageous terms, this simply means that allowance is to be made on his behalf for replacement and repair. When this is done, the worker will be on a level with the employer in their bargaining together.

Hobson goes to extremes, but there is a valuable thought in what he says. The capitalist may lose a portion of his capital if it is not employed. He has no guarantee that he can maintain his supply of capital, and he must himself in addition have an income for subsistence. Supposing that subsistence were guaranteed,

there are people who would do no work at all. We are told by travellers how hard it is to induce negroes in Africa to work; and our American negroes as well as a large class of white people would in many cases lapse into vicious idleness with a guarantee of subsistence, unless it were in return for hard work.

This brings us to a consideration of the other side of the question. There are certain classes of skilled labourers whose position is a favourable one and who are able to secure better terms in the labour bargain. There are even cases of special skill, where the seller has a superiority over the buyer, as for example a highly skilled surgeon: and of monopoly skill, as for example the best surgeon within reach, an unrivalled opera singer, etc. If we even consider the position with regard to domestic servants in the United States at the present time, we can scarcely maintain as a general rule that the seller of labour power is at a disadvantage. In the case of an instructor in a university, who is frequently so situated as to make a domestic servant a necessity, his need of a servant is more pressing than the servant's need of employment, and his margin of accumulation is far smaller. The extreme case, from this point of view, is that of a young, irresponsible wage-earner, contrasted with an employer who is struggling to keep his foothold and spending sleepless nights in the fear of losing his all.

The waiting power of employers is frequently not so great as at first seems to be the case. Interest, losses by unfulfilled contracts, etc., have to be taken into account. Bankruptcy cases provide instances of ruin

attributable wholly or at least partly to strikes: and yet the reasons for some of these strikes may have been relatively unimportant.

The central theoretical point may perhaps be found in this statement: the employer does not necessarily have an advantage in the bargain unless he employs a comparatively large number of labourers, preferably unskilled, so that one more or less is not of much importance.

With regard to contract in general, and the labour contract in particular, every country now recognises something higher than contract. But although much has already been done, we must be prepared to go further in this direction. Contract itself must be made to conform to higher ethical ideals and to harmonise with the progress of society. We ought to recognise even more clearly than our courts have done in the past the right to determine in advance what shall constitute a contract. It is advisable, more particularly, that "contracting out" should in many cases be abolished in order to secure real liberty. By contracting out is meant a coercive contract between employer and employees whereby the latter agree to give up for themselves and often for their heirs also the right to sue for damages for injury in consideration of receiving employment or of some inadequate return. The workmen's representatives urge that contracting out should be forbidden, because they hold that if it is allowed the provision for indemnification is nullified. Contracts freeing the employer from liability are generally forced upon the employees of express companies as well as upon

many others in the United States. The men have to sign the contract or they do not get the employment. It is urged that to make employers' liability acts effective and to secure real liberty, contracting out must be prohibited, unless some adequate remedy can be provided for the evils entailed. Instances of contracting out are given which show that employers' liability is rendered null and void when liberty to contract out is allowed. It is also stated that where contracting out has been prohibited, accidents have diminished, because employers try seriously to prevent accidents if they have to pay compensation to the employee injured. In England contracting out is forbidden under the Workmen's Compensation Act, 1906. Only workmen who contract into a definite scheme of insurance which is certified by the Registrar of Friendly Societies to be as advantageous to them as the Act itself are allowed exemption from the provisions of this statute. In the British National Insurance Act, 1911, special provision is made against contracting out. For example, it is specified:

"Notwithstanding any contract to the contrary, the employer shall not be entitled to deduct from the wages of or other payment due to the workman, or otherwise recover from the workman by any legal process the contributions payable by the employer himself." [9]

Obviously, this act would be of no effect without such a provision. It may also be noticed that the New York Court of Appeals has recently recognised the principle of forbidding contracting out. In the case of Fitzwater *v.* Warren, decided October 22, 1912, it stated:

"'The doctrine of the Knisley case had been largely qualified, if not virtually over-ruled, by a subsequent decision of the Court of Appeals. Public policy precludes an employee from assuming a risk created by his employer's violation of a statute (for safety appliances, etc.) or from waiving liability of the latter for injuries caused thereby.'" [10]

But what has been already recommended is not enough. Wrong has been done under cover of contract and in order to secure reform without violence it is necessary to have retrospective legislation. Only in this way could slavery have been peacefully overthrown in the United States, and only in this way are the present beneficent changes in the land laws of Ireland being brought about. An individual has no power in himself to refuse to abide by a contract; nor can he determine what constitutes a contract.

Certain legal changes are needed which involve public regulation of contract. A new treatment of common employment may be instanced. At present, where the fellow servant rule has not been abolished, the workman finds himself on the horns of a dilemma. The courts hold that if an employee suffers on account of the carelessness of a fellow servant he has no claim for damages on his employer. But if a workman then decides to choose his own fellow servants and to refuse to work with those whom he does not consider competent, he may perhaps be held guilty of conspiracy.[11]

Moreover, we must guard against contracting for too long a period, so as to lessen the liberty of making contracts in the future, and we must not let contract nullify itself.

As far as contracting for the future is concerned, it may be said that the distant future is vague and indefinite, while a contract should be for a certain specified time. There is an old legal maxim to the effect that time is of the essence of a contract. It was on this ground that John Stuart Mill objected to indissoluble marriage, as a contract in perpetuity. The present writer holds that this implies a wrong idea of the marriage tie, which is something more than a contract, and ought to be binding for life, because the welfare of society demands it. With economic contracts, however, the case is different.

When we turn to the question of contract nullifying contract, we find a good illustration in the labour contracts customary in Germany. It is said that in Germany a boy who learns a trade frequently has to sign a contract binding himself not to compete with his employer in after life. This is called the competition clause (*Konkurrenzklausel*). Sometimes, in order to learn a trade, a boy who has not ten pfennigs to his name has to bind himself, in case he ever enters into competition with his present master, to pay him a penalty of 10,000 marks ($2,400). In some cases the apprentice has to promise not to compete in the German Empire, and occasionally not to compete in any European country.[12] This practice amounts to taking advantage of the immediate needs and the want of foresight of a boy; and it is manifestly opposed to economic freedom. A typical instance of hardship due to this clause is the case of a technical employee working for a company, who is not allowed to set up for himself in business. There

are reasonable limits to contract. In the stipulation that an apprentice, when he has learned a business, shall not compete within a certain limit of time or in the same place, there may be nothing objectionable. But contract must sometimes be limited in the interest of free contract. According to the teaching of the older German jurists, such contracts as we have described were held null and void, as being against public policy: but the recent tendency of the German courts has been in favour of upholding such contracts, in spite of vigorous protests which have been raised.[13]

There is no doubt that American courts and the courts of all other civilised countries recognise that public policy must not be nullified by private contracts. At the same time this needs to be even more strongly emphasised and it may be predicted that certain classes of contracts will in future be prohibited and, if entered into, will be pronounced by the court to be null and void.

Notes and References to Chapter VI

[1] P. 627. Certain kinds and aspects of personal services are discussed in Chapter X *post*. In the abundance of literature the following books are mentioned as perhaps especially helpful in connection with this chapter:

Mr. and Mrs. Webb's *Industrial Democracy*, Pt. II, Chap. II, "Collective Bargaining." The entire work is a discussion of the subject.

Schmoller's *Grundriss der allgemeinen Volkswirtschaftslehre*, Pt. II, 7, "Arbeitsverhältniss, Arbeitsrecht, Arbeitsvertrag und Arbeitslohn," pp. 259–317.

Schaffner's *The Labor Contract from Individual to Collective Bargaining* (Bulletin, University of Wisconsin, Economics and Political Science Series, Vol. II, No. 1, 1907).

Ely's *Labor Movement in America*, Chap. IV, "The Economic Value of Labor Organizations."

Hobson's *Economics of Distribution*, Chap. VII, "Bargains for the Sale of Labor-Power."

Bullock's *Introduction to the Study of Economics*, Chap. XIV, "The Wages System"; it includes a discussion of Labour Contract.

F. J. Stimson's *Labor in its Relation to Law;* also his more elaborate work, *Handbook to the Labor Law of the United States.*

[2] P. 627. The following cases illustrate liberty of contract as applied especially to the labour contract: Jones *v.* People, 110 Ill. 590 (1884); Godcharles & Co. *v.* Wigeman, 113 Pa. St. 431 (1886); Hancock *et al. v.* Yaden, 121 Ind. 366 (1889); *Ex parte* Kuback, 85 Calif. 274 (1890); Commonwealth *v.* Perry, 155 Mass. 117 (1891); State *v.* Loomis *et al.*, 20 S. W. (Mo.) 332 (1892); Low *v.* Rees Ptg. Co., 41 Neb. 127 (1894); Leep *v.* Railway Co., 58 Ark. 407 (1894); Harding *v.* People, 160 Ill. 459 (1896); Shaver *v.* Pennsylvania Co., 71 Fed. 931 (1896); Commonwealth v. Beatty, 15 Pa. Superior Court 5 (1897); Holden *v.* Hardy, 169 U. S. 366 (1898); *In re* Morgan, 26 Colo. 415 (1899); Fiske *v.* People, 188 Ill. 206 (1900); City of Seattle *v.* Smyth, 22 Wash. 327 (1900); Woodson *v.* State, 69 Ark. 521 (1900); Knoxville Iron Co. *v.* Harbison, 183 U. S. 13

(1901); People *ex rel. v.* Coler, 166 N. Y. 1 (1901); Kilpatrick *v.* G. T. Ry. Co., 74 Vt. 288 (1902); Republic Iron & Steel Co. *v.* State, 160 Ind. 379 (1903); Patterson *v.* The Endora, 190 U. S. 169 (1903); Mathews *v.* People, 202 Ill. 389 (1903); Kellysville Coal Co. *v.* Harrier, 207 Ill. 624 (1904).

See also list of cases in Appendix IV, on Police Power and Labour Contract.

[3] P. 627. Mrs. Sidney Webb, *Commonwealth*, February, 1896.

[4] P. 628. Quoted by Hobson, *Economics of Distribution*, pp. 220–1.

[5] P. 628. Pullman, Illinois, serves as an illustration. See the author's article on Pullman in *Harper's Monthly Magazine*, February, 1885. But it is not to be supposed that in this case we have to do with deliberate malice. Mr. Pullman believed that his plans would be beneficial to his wage-earners. The investigator of the U. S. Department of Labor, Mr. Walter B. Palmer, makes the following statement about the Calumet and Hecla Mining Company:

"The mining companies grant five year ground rent leases to employees who wish to build houses to use as dwellings. The ground rent lease of the Calumet and Hecla Mining Company provides that if the lessee shall fail to pay any taxes or assessments, or if he should cease to be an employee of the company, by discharge or otherwise, or if without the written consent of the company should sell, assign, or transfer the lease, or sell, assign, lease or sublet the house he has built on the land, or if he should do several other specified things, the lease shall after ninety days become void, the company shall have the right, without notice to take full possession of the land and the house thereon built by the lessee, and if the house should not be removed by the lessee within ninety days after re-entry it shall vest in and become the property of the company without liability to pay for the same or any part thereof.

"Some other companies have leases similar in terms, except that they also have a provision that in case the lease terminates, by above specified causes, the company shall pay for improvements as agreed between the company and the lessee, or in case of their disagreement the company shall pay for the improvements at an appraised valuation." *Cf.* U. S. Department of Labor, Bureau of Labor Statistics Bulletin No. 139, "Michigan Copper District Strike" 1914, where much further information is given about these leases.

[6] P. 629. Modifications of this general statement must be made in case of pressing indebtedness and of need generally.

[7] P. 629. Hobson, *op. cit.*, pp. 218–9. The rest of the paragraph follows Hobson closely.

[8] P. 630. In the case of a strike of wage-earners in laundries in Chicago, the employees did make the demand that the employers should abandon their organisation. Such cases are extremely rare. If the employees should become stronger, cases of this kind might be expected to increase in frequency, unless in the meantime better methods of settling industrial conflicts are devised.

[9] P. 635. British National Insurance Act, 1911, Part II, Section 85, Sub-division 4 (Bulletin of the United States Bureau of Labor, Workmen's Insurance and Compensation Series No. 2, July, 1912, p. 67). A standard work on the Act generally is *National Insurance*, by A. S. Comyns Carr and other writers, with a preface by the Right Honourable D. Lloyd George.

[10] P. 636. See art. "Judges Do Move," *The Nation* (N. Y.), November 14, 1912; the opinion in the case is printed in the *Law Journal* of November 4, 1912.

[11] P. 636. The fellow servant rule seems to have been established by three decisions: (1) Chief Baron Abinger's decision in Priestley *v.* Fowler, 3 Meeson and Welsby 1 (England, 1837), the classic case in this connection, the plaintiff in which was a butcher's driver's helper who had been injured by the breaking down of the butcher's van on which he was riding (Downey, *Work Accident Indemnity in Iowa*, p. 26:) (2) Murray *v.* South Carolina Railroad Company, 1 McMullan 385 (South Carolina, 1841) where it was held that a stoker injured by the negligence of the engine driver under whom he worked was not entitled to damages: (3) Farwell *v.* Boston and Worcester Railroad Corporation, 4 Metcalf 49 (1842) in which an engine driver suffered the loss of a leg through a signalman's neglecting to change a switch (*op. cit.*, pp. 27, 28). For a discussion of the entire fellow servant rule see Downey, pp. 25–48.

[12] P. 637. The law provides that a minor may not bind himself, and this assertion would seem to imply that he is bound by his parents or guardians.

[13] P. 638. The law as it exists at the present time is found in *Die Gewerbe-Ordnung*, edited by Dr. L. Hoffmann (Berlin, 1913, 15th ed.) Tit. VII, § 133 f, p. 445. The law permits the judge to lessen

the penalty provided in the contract for a violation of the competition clause (*Konkurrenzklausel*) when it is considered to be too high. It is further provided that the entire contract is invalid if it cannot be so changed as to reduce the penalty to a just one. It has been held further by the Court of the Empire that the provision that one may not enter into a competitive business for three years is reasonable.

The subject is still agitated and it is hoped that the law which treats of the competition of employees with their former employers will be further modified so as to afford additional protection to the employee. This subject was discussed in the *Archiv für Sozialwissenschaft und Sozialpolitik*, Vol. XXXVII, p. 343, *Sozialpolitische Chronik*, art. "Angestelltenorganisationen und Sozialpolitik," and in *Die Neue Zeit*, "Die Konkurrenzklausel und die Handelsangestellten," art. by G. Hoch, Vol. XXXI, pp. 477–480, Dec. 27, 1912.

CHAPTER VII

CLASS LEGISLATION

What does class legislation really mean? It is a strange perversion of the phrase class legislation which we witness at the present time and to which we listen. Class legislation originally signified favours conferred on a few, separating them out from the mass, such as patents of nobility, etc. A certain cynicism and a scepticism concerning the sincerity of those who oppose laws for the masses on grounds of class legislation are not unnatural when we see how legislation originally directed against the strong is by them turned against the relatively weak. It is so with class legislation. First of all, let us examine the phrase "class legislation". We have already seen that persons exist in classes as do things. They were made so by nature and environment, and we cannot deal with them otherwise than as classes. As Cooley says in his *Constitutional Limitations:*[1] "It is proper to recognize distinctions that exist in the nature of things." Let us consider different classes of things, for example, farms; this is one class of property. Also we have farmers, who form one class of men, with different needs from other classes of men. We have railways and those connected with them, constituting another class of property and another class of

men. There are those who are concerned with mercantile establishments, factories, elevators, banks, etc., in one way or another. All of these constitute various classes in a community, and we have legislation applicable to these classes of things and the classes of persons who have to do with them. We have banking acts, but they do not apply to all classes of corporations. We have laws sometimes of local application because the needs of the locality require them. Where no special legislation for cities is allowed, as in Ohio, it is necessary to classify the cities. Possibly there may be only one city in a class but we have classes of cities because things exist in classes. Notice also here the suggestion of a difference between *special legislation* and *class legislation*. Special legislation would be legislation for an individual case.[2] Grants of public utility franchises have often been given to a favoured class and afford a real grievance, because these grants were frequently made originally by class legislation in the worst sense of the term.

We have also class legislation with respect to vendors of intoxicating drinks and to other vendors, limiting contracts. We have legislation concerning vendors of poison, inspection of elevators, and homestead acts, all limiting contracts. Homestead acts legislate in the interests of those who have homesteads and exclude from their operation those who do not have them. They are legislation directed against the class of creditors. In fact *all labour legislation to be of worth has to be class legislation in one sense of the word.* We have classes and we recognise these classes in factory legislation. It is not class legislation in the invidious sense, because the

aim is to benefit the great mass and through social solidarity to benefit the whole. It is believed that in benefiting the class we benefit the whole of society, for society lives in a condition of solidarity. We find illustration in the twelve hour law for street car employees in Maryland. In many ways such a law benefits the community as a whole. For years it prevented strikes, disturbances of the peace, and injury to the weaker classes of the community. Take especially the case of protection of street car motormen by enclosed vestibules. We cannot say that this is class legislation in an invidious sense simply because it does not apply to milk wagons. Also the employment of women in coal mines is prohibited because of special features connected with it. Many of the more important labour laws are excellent examples of class legislation.[3]

In the New Zealand laws, for example, there is always reference to a special class. Such reference is also found in a brief prepared by Mr. Andrew A. Bruce [4] and Mr. Ela in a case which was brought before the Supreme Court of Illinois in regard to the employment of women: "A law under this branch of the legislative power (*i. e.*, police power) is not obnoxious to the objection that it does not regulate all occupations which are dangerous, or which need regulation. It is palpably impossible to apply such a rule to laws of this nature. They are regulations demanded by considerations of public policy. This kind of legislation, whether by State legislatures or city councils, must be progressive; it cannot cover the ground in one act; it must furnish the remedy as the need appears, or the public vicissitudes demand. And

the law, in any event, only requires that the regulation should apply to the particular class which is affected in the same manner, as has been held by this court in cases hereinafter recited." [5]

Mr. Justice Bruce has elaborated this thought still further in an article on "The True Criteria of Class Legislation" [6] where he finds the only and true test to be whether one is injured or put to a disadvantage in his competition with others. He expresses his idea as follows:

"And is not the test of class legislation after all whether or not by that legislation any person is hindered in his struggle or competition with his fellow men, and not whether the rules which are adopted to regulate his particular trade or calling are made to apply to trades and callings with which he has no concern? Is not this all that the term 'Equal protection of the Laws' implies? There is, for instance, no competition between the woman working on the farm, and the woman working in the office, or between the woman in the office and the woman in the factory, nor even between the women working in different kinds of factories or workshops, nor is there any competition between the manufacturer and the farmer or the merchant and the lawyer. No regulation then of the class may be necessary, and if not necessary it is a deprivation of property without reason based upon the public welfare, which is nothing more or less than a deprivation of property without due process of law. If, however, it is necessary and is wise in its nature, the legislation which it imposes should not be nullified merely because it is not broad enough to include the whole of organized society. The inquiry should be is it wise, is it necessary, does it include all competing with one another in the particular trade, business or calling; not whether other independent callings are similarly regulated and controlled. A beginning for all police

legislation must be made somewhere, and that somewhere is where the exigency is made manifest by the legislature. Regulation may also be needed elsewhere, but that need does not necessarily negative the necessity for the regulation in the place where it is afforded."

We cannot, then, take the whole mass of society at once. The same point was brought out in a decision written by Mr. Justice Field of the United States Supreme Court.[7] The law provides that no person owning, or employed in, a public laundry or public wash house within the limits prescribed by the ordinance of San Francisco should wash or iron clothes between 10 P. M. and 6 A. M. or on Sundays. The unanimous opinion was: "It is not legislation discriminating against any one. All persons engaged in the same business within it are treated alike; are subject to the same restriction and are entitled to the same privileges under similar conditions." [8]

Laws against payment in kind or anti-truck laws (also called anti-store order laws) are made applicable to classes in the community, when they are good laws. They are generally not needed, but there are certain classes in some parts of the country who require their protection and miners working in comparative isolation are one of these classes. After a good deal of wavering, the drift of judicial decision seems to favour the constitutionality of such legislation.[9]

The same principle has been affirmed in Michigan in the case of the Sunday closing law for barbers. The Supreme Court of Michigan declared that "By class legislation, we understand such legislation as denies

rights to one which are accorded to others, or inflicts upon one individual a more severe penalty than is imposed upon another *in like case* offending," and quoted from Cooley's *Constitutional Limitations* (6th ed., p. 479) as follows: "If the laws be otherwise unobjectionable, all that can be required in these cases is that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the legislature must judge." [10]

Now with the evolution of society, differentiation develops and new economic classes continually emerge; consequently we should naturally expect an increase in class legislation, and frequently a test of sound legislation is precisely this, that it is class legislation. But this does not mean that class legislation may not unduly favour a class or unduly burden a class. In a modern democracy this danger is especially pronounced. To use one illustration, agricultural landed property is far safer in the United States, where the land-owning farmer is capable of dominating legislation, than in England, where the agricultural land owners and farmers are a small minority.

In this matter of class legislation we can provide no formulæ which make a just and wise policy easy. All that can be done is to indicate the general principles which must be applied justly and wisely to concrete cases as they arise.

There are also decisions of a different kind which the courts do not hold to be class legislation, but which the working people feel are class legislation or class deci-

sions. Mr. and Mrs. Webb call attention to such a decision reached concerning common employment,—that the workmen may not claim damages when the accident is due to one engaged in the same employment. According to these authors: "To the manual worker this distinction for which Lord Abinger was chiefly responsible, seemed an intolerable piece of class legislation." [11]

Notes and References to Chapter VII

[1] P. 643. *Constitutional Limitations*, 7th ed., p. 889.

[2] P. 644. In the case of People *v.* C. P. Ry. Co. (105 Cal. 576, 1895) it was stated:

"A law which operates only upon a class of individuals is none the less a general law if the individuals to whom it is applicable constitute a class which requires legislation peculiar to itself, in the matter covered by the general law, and which is germane to the purpose of the law."

And in the case of Nicholas *v.* Walter [37 Minn. 264 (1887), at p. 272] the following view was taken:

"The true practical limitation of the legislative power to classify is that the classification shall be based upon some apparent natural reason, some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes, as suggests the necessity or propriety of different legislation with respect to them."

[3] P. 645. Consider also mechanic's lien labour laws, the eight-hour day for miners in Utah, usury laws, anti-oleomargarine laws, and many others, some good, some doubtful, some bad.

[4] P. 645. Now Justice of the Supreme Court of North Dakota.

[5] P. 646. See Brief and Argument of defendant in error prepared by John W. Ela and A. A. Bruce, p. 29, Ritchie *v.* People, 155 Ill. 98 (1895).

[6] P. 646. 60 *Central Law Journal*, June 1905, p. 425.

[7] P. 647. In the case of Barbier *v.* Connolly, 113 U. S. 27 (1885).

[8] P. 647. P. 23 of Brief. *Cf.* p. 24.

[9] P. 647. See Peel Splint Coal Co. *v.* State, 36 West Va. 802; also Harbison *v.* Knoxville Iron Co., 183 U. S. 113. The reader who desires to pursue the subject further is referred to Judge Bruce's article "The Anthracite Coal Industry and the Business affected with a Public Interest," VII *Michigan Law Review* (June, 1909) pp. 633–642.

[10] P. 648. People *v.* Bellet, 99 Mich. 151 (1894).

[11] P. 649. *Industrial Democracy*, Vol. I, p. 367.

CHAPTER VIII

FACTS AS TO IMPAIRMENT OF LIBERTY. DEPRIVATION OF PROPERTY AND POSSIBILITY OF INDIVIDUAL REGULATION OF CONTRACT AS OPPOSED TO CLASS REGULATION. LAW *VERSUS* TRADE UNIONS FOR CLASS REGULATION

There can be little doubt as to the facts concerning the impairment of liberty under individualistic contract. Preceding chapters have made this clear. It is said we must not deprive the workman of his liberty to work in factories on Sunday. But that is not liberty. No workmen desire long hours and payment in kind: the claim that they desire this is either sophistry or claptrap. It is said that their liberty is impaired because they cannot contract to work thirty-six hours in succession nor to take payment in goods over the quality and price of which they have no adequate control; but they do not desire these evils if the evils can be obviated; and in collective action we find at least a partial remedy. All this is clearly illustrated by a quotation from an article by Professor John R. Commons concerning a decision of the Supreme Court of Illinois on the eight hour day for working women [Ritchie *v.* People, 155 Ill. 98 (1895), which has since then been reversed in Ritchie & Co. *v.* Wayman, 244 Ill. 509 in 1910—only five years later].

"The Supreme Court of Illinois has declared unconstitutional the factory and sweat shop act limiting the working day for women to eight hours. The grounds of the decision seem to be that the Constitution guarantees freedom of contract; that the power to labor is a species of property which is protected by the Constitution; that women are receiving higher legal rights in other directions; and to deprive them of the right to freely sell their labor power under any conditions whatever is to remand them back again to a lower legal position.

"The evil aimed at is the working of women and children 12 to 16 hours a day in the Chicago sweat shops. It is not likely that the law deprives such women of a great amount of freedom. There are various degrees of freedom. The court would probably not permit the sweaters' victims to sell themselves by contract into absolute slavery, although many of them would doubtless better their condition by doing so. Speaking of the decision the *Chicago Times-Herald* says:

"'There is a ghastly sort of irony in the attempt of the supreme court to explain or excuse its decision upon the plea that it is protecting the rights of weak individuals with labor to sell. Of course, a judicial tribunal cannot be expected to take cognizance of the facts that working people, in so far as they are represented by labour organizations and earnest but unofficial friends of the laboring classes, urged the enactment of the law, and that millionaire firms attacked its constitutionality. These things cannot, perhaps, be brought within the official purview of a court, but they can and shall be presented to the people. What a mockery it is to read that the supreme court has demolished this humane, this civilizing law on the plea that it robs the poor of their right to sell their labor as they will. Dives demands protection. The court accedes to his demand, but pleads that it acts in the interests of Lazarus.'" [1]

If the court had not made the decision on the ground

that they were trying to protect the freedom of the workingmen it would have been another matter. But especially irritating was the claim of the judges that they were carrying out the wishes and desires of the wage-earning class when they were really carrying out the schemes of the big firms behind them who had put up their money to defeat the law.[2]

Take again the plea that we sometimes see in the decisions of the courts, that regulation of contract deprives persons of the opportunity to work. A sound point was made in the decision of the Massachusetts Supreme Court, that the law prohibits work only at certain times and places or under specified conditions. Mary Shirley, a woman over twenty-one years of age, was employed in a manufacturing establishment over ten hours a day and the employer was convicted.[3] In giving the opinion, the court stated:

"It is also said that the law violates the right of Mary Shirley to labor in accordance with her own judgment as to the number of hours she may work. The obvious and conclusive reply to this is that the law does not limit her right to labor as many hours per day or per week as she may desire. It merely prohibits her being employed continuously in the same service more than a certain number of hours per day or week, which is so clearly within the power of the legislature that it becomes unnecessary to inquire whether it is a matter of grievance of which the defendant has a right to complain." [4] The limitation promotes health and increases the total capacity for labour. She can work elsewhere but not in that particular time and

place. The point made by Ela and Bruce in their brief already referred to is that this act does not take from her the right to work but increases her right to work, for the law which promotes health and preserves strength thereby increases the total capacity for work, which is the true purpose of these laws. If persons are allowed to work fifteen hours per day the labour power is soon exhausted: thus the law which prevents this really increases the capacity for work.

It is said that to deprive working people of the right to work deprives them of their property, because labour is their property and contract is one of the incidents of property. But the effect is to increase property, as we have just seen. In the case of an anti-truck law,[5] a West Virginia judge thought that "The right to contract in respect of property, including contracts for labor, is property, protected by the Constitution." A full grown citizen has a right voluntarily to contract to receive groceries instead of money. We cannot, the court maintained, interfere with that right.

In opposition to the view of the court we can say, first, then, that property itself is subject to regulation for public good, that is, health, morals, etc.; and second, that the object of the anti-truck law is to protect wage-earners' property against a system involving a poor use of it.[6] We must take exception to the words "voluntary contracts". It must be recognised that there is a coercion of economic forces. We have here again the problem of the twentieth man,—one man yielding and forcing the others to yield, so that the only way the nineteen men can be protected is to compel the twentieth

man. This was illustrated in the case of the barbers in Madison, Wisconsin, when they wanted to close their shops. They got the consent of all but one man, but that one man forced the action of the nineteen others. This control of a small minority makes individual regulation impossible for the mass.

It is to be observed that our courts have also in some cases recognised the coercion of economic forces. This has happened particularly in the case of common carriers and the public. The following quotation from a decision of the United States Supreme Court illustrates this point:

"The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts. His business will not admit of such a course. He prefers, rather, to accept any bill of lading or sign any paper the carrier presents, often indeed without knowing what the one or the other contains." [7]

It must be observed here in criticism that in other contracts, and especially in labour contracts, the coercion of economic forces has not received that recognition which must be demanded by a realistic jurisprudence, based on the actual economic life of the twentieth century. It is particularly our State courts which lag behind economic development, and these too often afford a humiliating contrast with the usually enlightened decisions of the United States Supreme Court.

For the masses we must have regulation. We may say, Let us have it through trade unions instead of by

statutes.[8] But there is difficulty in this, and if regulation is a matter of general social concern there are many reasons why it is better to settle it by law than by trade unions. It tends better to promote the public peace. No one can say how many strikes in Baltimore we might have had, had it not been that the law regulated the length of the working day for street car employees. Is it not in accordance with the development of civilisation to have such a matter decided by a body which represents the general public—that is to say, the legislature; or, still better, by a commission like the Wisconsin Industrial Commission carrying out the wishes of the legislature in establishing "reasonable" conditions? [9]

Courts seem to tend in the direction of recognition of classes; for example, in taxation, "equality" in Constitutions is frequently interpreted to mean equality as to class. But the movement is too slow. However, lately the courts have been upholding legislation which formerly they declared unconstitutional, and it has been said that "for courts they are moving pretty fast," as is clearly shown in the cases cited on the Labour Contract. See Appendix IV, Part IV, 2. The old story—things righting themselves in the long run—is as pernicious here as in many other cases.[10]

Notes and References to Chapter VIII

[1] P. 652. By J. R. Commons in *The Kingdom*, April 12, 1895.

[2] P. 653. Schmoller makes the point that the old labour contracts preceding the so-called freedom of labour contract were arranged in accordance with custom and law in certain fixed types; that is to say, the contracts were class contracts. This was the case, for example, with journeymen, with household servants, and with mine labourers. It was determined what payment they should receive, both in kind and in money, also what shares of profit they should receive, if any. It was thus determined when and how the work should be done, what free time the labourers should have, whether or not they should work on Sunday, etc. The labour conditions were regulated for the entire course of the labourer's life in accordance with economic conditions of production on the one hand, and on the other in accordance with certain moral and legal points of view corresponding to the needs of the family life, etc. Later it was thought that all limitations upon labour contracts should be removed and that each one should make his own individual contract. This was the eighteenth century philosophy. Schmoller also points out the fact that the so-called free labour contract may indicate deterioration in condition for the indolent and backward labourers, for the immature (those who are not adults), and for women and children; that is, as compared with the former status. (Notes from the lectures of Professor Gustav Schmoller). But Schmoller has shown that even now the individual contract in labour relations plays a far smaller rôle than we are apt to think. Contracts are made for groups; they become type-contracts rather than individual contracts, and not only are substantially the same for great groups and classes, but they are increasingly regulated by social forces, including legislation and administration. This is clearly brought out in Schmoller's *Grundriss der Allgemeinen Volkswirtschaftslehre* (1st ed., Pt. II, Bk. III, §§ 205–208, pp. 268–292).

[3] P. 653. According to brief of Ela and Bruce, p. 9.

[4] P. 653. Commonwealth *v.* Hamilton Manufacturing Company, 120 Mass. 383, Supreme Court of Massachusetts.

[5] P. 654. Stimson, *Labor in its Relation to Law*, p. 61.

[6] P. 654. Unfortunately it is still the general rule that statutes against truck stores or payment in kind are held unconstitutional. The *Cyclopædia of Law and Procedure* (Vol. VIII, p. 888) gives the following cases in *accord* and *contra* the dictum that "A statute is void which attempts to regulate the payment of wages or sale of goods to employees."

Accord

1. Leep *v.* St. Louis Rd., 58 Ark. 407 (1894). (The method of wage payment is regulated, but it is not a script case.)

2. Harding *v.* People, 160 Ill. 459 (1896). (Statute regulated the weighing of coal. Unconstitutional as an interference with free contract.)

3. Braceville Coal *v.* People, 147 Ill. 66 (1893). (Statute requiring weekly payment of wages held unconstitutional.)

4. Frorer *v.* People, 141 Ill. 171 (1893). (Here a script statute was held void.)

5. Comm. *v.* Perry, 155 Mass. 117 (1891). (Statute attempted to prevent the fining of employees for defective work. Held void, but dissenting opinion by Mr. Justice Holmes was rendered.)

6. Comm. *v.* Potomska Mills, 155 Mass. 122 (1891). (Same as previous).

7. People *v.* Coler, 166 N. Y. 1 (1901). (One of the terms of the contract was to pay the prevailing rate of wages. Held void this provision.)

8. *In re* Preston, 63 Ohio St. 428 (1900). (Statute provided for the weighing of coal before screening. Held void.)

9. State *v.* Norton, 7 Ohio Superior & Common Pleas Dec. 354 (1897).

10. Comm. *v.* Brown, 8 Pa. Super. Ct. 339 (1897). (Weighing provided by statute as previous to screening. Held void.)

11. Comm. *v.* Isenberg, 4 Pa. Dist. 579 (1895). (Statute required semi-monthly payment of wages. Held void.)

12. State *v.* Fire Creek Coal, 33 W. Va. 188 (1889). (Statute prevented sale by employer of goods at a higher per cent. profit than others. Held void.)

13. State *v.* Goodwell, 33 W. Va. 179 (1889). (This was a script case.)

Strictly speaking, only two of these are truck cases, numbers 4 and

13, the rest being some other form of interference in the contract of labour performance. The following cases, as given by the *Cyclopædia of Law and Procedure*, hold script statutes void: Frorer *v.* People, 141 Ill. 66 (1893); State *v.* Goodwell, 33 W. Va. 179 (1889).

The cases below cited upheld the purpose of anti-truck legislation:

Contra

1. Woodson *v.* State, 69 Ark. 521 (1901). (Statute regulated the weighing of coal. Held valid.)

2. Jones *v.* People, 110 Ill. 590 (1884). (Statute regulated the weighing of coal. Held valid.)

3. Whitebreast Fuel *v.* People, 175 Ill. 51 (1898). (To same effect.)

The two Illinois cases here quoted are not *contra* to those cited in *accord*. Rather the authority for this reference, the *Cyclopædia of Law and Procedure* is in error in citing these cases here, for in both the court distinctly states that the State cannot interfere in the contract—that the parties can use their own judgment as to what shall be received in payment. These two Illinois cases should then really be cited with the accord, though the act in question is held proper, but that is because the court interprets it as not interfering.

4. Hancock *v.* Yaden, 121 Ind. 366 (1889). (Statute provided for payment at least once in every two weeks and in lawful money. Held valid. The court justifies the regulation, however, on the ground of the right of the State to protect and maintain lawful money.)

5. State *v.* Loomis, Mo. 20 S. W. 332 (1892). (Script case.)

6. Knoxville Iron Co. *v.* Harbison, 103 Tenn. 421 (1901). (Script case.)

7. Knoxville Iron Co. *v.* Harbison, 183 U. S. 13 (1901). (This case affirms the Tennessee case cited previous to this.)

8. State *v.* Haun, 7 Kans. App. 509 (1898). (Script law upheld. This case is not cited in the *Cyclopædia*.)

Cases numbered 4, 5, 6, 7, and 8 are script cases.

Indiana, Missouri, Tennessee, Kansas, and the United States Supreme Court say that script statutes, *i. e.* acts preventing the giving of script in payment of wages, or the making of such contracts for script, are constitutional. On the other hand, Illinois and West Virginia hold them to be unconstitutional.

The cases given above which are not script cases, however, are valuable as indicating what the States would probably hold on script cases. Those cases seem to indicate that Arkansas, Massachusetts, New York, Ohio, and Pennsylvania would also hold the script laws void; but this is not certain of any or all of these States.

But there are those learned in the law who look upon the plea that regulation forbidding truck stores is an interference with liberty, as the veriest nonsense, and the layman can find judicial denunciation of this view of liberty as strong as any language he is likely to use.

Even the law forbidding the imposition of fines by employers for defective work, although declared unconstitutional by a majority of the court in Massachusetts in the case above referred to as Comm. *v.* Perry, 155 Mass. 117, was upheld by Mr. Justice Holmes, then of that court, because he could not look upon it as an interference with fundamental rights. The following is a more detailed description of the case, which was decided December 1, 1891:

Mr. Justice Holmes dissented from the majority of the court in the opinion that the law to protect the employee from fines imposed for poor work and "forbidding the employer to withhold any part of the contract price from such weaver upon his doing the work improperly, and in requiring such an employer to pay the same price for inferior work as for good work," is in conflict with the Constitution and particularly with Art. 1 of the Declaration of Rights which secures to all the right "of acquiring, possessing and protecting property."

In dissenting Mr. Justice Holmes stated:

"I cannot doubt that the legislature had the right to deprive the employers of an honest tool which they were using for a dishonest purpose, and I cannot pronounce the legislation void, as based on a false assumption, since I know nothing about the matter, one way or the other. The statute, however construed, leaves the employers their remedy for imperfect work by action. I doubt if we are at liberty to consider the objection that this remedy is practically worthless; but if we are, then the same objection is equally true although for different reasons, if the workmen are left to their remedy against their employers for wages wrongfully withheld." Commonwealth *v.* Perry, 155 Mass. 117, at pp. 124–125.

[7] P. 655. Railroad Co. *v.* Lockwood, 17 Wall. 357 (1873), at p.

379. *Cf.* Liverpool and Great Western Steam Co. *v.* Phenix Co., 129 U. S. 397, at p. 441 (1889).

[8] P. 656. In the case of Fiske *v.* People, 188 Ill. 206 (1900), an ordinance requiring that only union labour be employed upon public improvements was held void, because of unjust discrimination between classes of citizens.

To take another instance: The charter of Buffalo provided that in city contracts a clause could be inserted binding contractors not to discriminate against union labour, nor to accept more than eight hours as a day's work. The defendant was arrested and fined for employing men ten hours a day, at an agreed wage. The court held the arrest void because the clause in the charter was only directory and could not be the basis of a criminal action. The court really did not go into the constitutionality of such an ordinance. People *ex rel. v.* Beck, 144 N. Y. 225 (1894).

[9] P. 656. For further discussion of this point, with especial elaboration of the idea of reasonableness, see art. on "Constructive Investigation and the Industrial Commission of Wisconsin," by Professor John R. Commons, former member of the commission, in the *Survey*, January 4, 1913.

[10] P. 656. Mr. Justice Brown states the progressiveness of the law in Holden *v.* Hardy, 169 U. S. 366 (1898), at pp. 386, 387. He says the law will virtually "be forced to adapt itself to new conditions of society and particularly to the new relations between employers and employees." (p. 387). But still more noteworthy is the statement of Mr. Justice J. B. Winslow, Chief Justice of Wisconsin, in Borgnis *et al. v.* Falk Co., 147 Wis. 327 (1911). See the quotation given *post* Chap. IX, pp. 681, 682.

APPENDIX TO CHAPTER VIII

"THE BAKERS' CASE"

Let us see if we can get any help from the case of the bakers, known as Lochner *v.* N. Y.[1]

The case considers the constitutionality of the ten hour law passed by the legislature of New York concerning bakers. It was decided April 17, 1905, by the Supreme Court of the United States. The law provided a number of things but the point at issue was the regulation of labouring hours for bakers and for employees in confectionery establishments. It provided that no employees should be required or permitted to work in the biscuit, bread, or cake bakeries more than sixty hours in any one week or more than ten hours in any one day, unless, to make Saturday a half holiday, they wanted to work longer on the previous five days. They could not, for example, work eighteen hours a day for three days and not work at all on the other three days. The law also made requirements as to furniture, utensils, wash-rooms, water-closets, etc., apart from the bake-room; for instance, no person was allowed to sleep in the bake-rooms. Provision was made for the inspection of bakeries, etc.

This law was sustained by the County Court of Oneida County, by the New York Superior Court, and

by the Court of Appeals of New York State. It was reversed by the United States Supreme Court with a decision of five against four. The opinion was delivered by Mr. Justice Peckham and concurred in by four other judges, Mr. Justice Brewer among them. A dissenting opinion was given by Mr. Justice Harlan. Then a more strongly and more radically dissenting opinion was given by Mr. Justice Holmes alone.

When we read the majority opinion we are impressed by the fact that no consideration whatever is given to economic forces. It is stated in the majority decision that no physical force has been employed to make the bakers work more than ten hours a day. The conclusion of the court is that since physical force is not employed to compel the employees to work more than ten hours, the contract is a voluntary contract. There evidently floats before the minds of the judges this alternative: either physical force or voluntary contract. The law says that no employee shall be *required* or *permitted* to work more than sixty hours, etc. The mandate of the State is that no employee shall contract or agree to work more than ten hours a day. There is no provision for emergency, as the statute is mandatory in all cases. There is absolute prohibition put upon the employers, who can, under no circumstances, permit more than ten hours' work per day by employees. The question, then, is one of liberty. Here is an invasion of individual liberty. The employee may desire to earn the extra money, which he would be paid for working more than the prescribed time, but this statute forbids the employers permitting the employee to earn

it. The opinion of the court as voiced by Mr. Justice Peckham includes the following statements: "It is a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor. . . . There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities?"

Here we see again that the employers organise and provide funds to fight laws regulating hours of labour, and yet we find that the decisions declaring the laws null and void are based not on tender consideration for the employers but for the employees, whose friends have worked to secure the law. Now it may be that the courts are perfectly sincere in thus thrusting before us the interests of the employee rather than the interests of the employer. Yet one must pause to ask, Why is it that the law is attacked not by the employees but by the employer? Why is it that the employees stand to-

gether and contribute money to restrain their own exercise of liberty, whereas the employers contribute to fight all laws of this kind? Will anyone want to say that the employers are animated by the spirit of philanthropy? Are they moved by a more tender consideration for the employees than the employees themselves have?

Mr. Justice Peckham taking up in his opinion also the matter of police power which limits the right to contract expresses himself as follows:

"There are certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere.

"The State, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection. If the contract be one which the State, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment. Contracts in violation of a statute, either of the Federal or State Government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Federal Constitution, as coming under the liberty of person or of free contract."

We are told also that there are noteworthy cases in

which the limitation of individual liberty has been sustained by the Supreme Court of the United States. Consideration is given to the well-known Utah statute, an act limiting the employment of workmen in all underground mines or workings to eight hours per day "except in cases of emergency where life or property is in imminent danger." The act was held to be a valid exercise of the police powers of the State. It was considered that the kind of employment, mining, smelting, etc., and the character of the employees in those kinds of labour, were such as to make it reasonable and proper for the State to interfere to prevent the employees from being constrained by the rules which the proprietors laid down in regard to labour. It will be observed that even with regard to that class of labour the Utah statute provided for cases of emergency wherein the provisions of the statute would not apply, whereas, as already stated, in the statute relating to the hours of bakers, there is no emergency clause.

A little further on in this same decision the view is expressed that police power must be limited, otherwise the Fourteenth Amendment would be of no value. The court says, "In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labour which may seem

to him appropriate or necessary for the support of himself and his family?"

Noteworthy, too, is the clear expression of that economic philosophy, which regards any control of this sort in question as paternalism. The state, as legislature, is looked upon not as the people acting together to accomplish certain purposes but as an extraneous or foreign power.

In this opinion we observe that generally speaking, there is a failure to discriminate between the needs and requirements of the various classes in a community, especially between the classes of varying economic strength. It is said that the hours of professional men often are so long as to be detrimental to health. Must the legislature, therefore, in its paternal wisdom, legislate on this subject and limit the hours of lawyers, doctors, and bank clerks, forbidding them to work more than eight hours a day because, for instance, the artificial light in their offices is unwholesome? "Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employees, if the hours of labor are not curtailed."

Further on Mr. Justice Peckham says: "When asser-

tions such as we have adverted to become necessary in order to give, if possible, a plausible foundation for the contention that the law is a 'health law', it gives rise to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare." [2]

This legal decision is an expression of Herbert Spencer's philosophy. The court in this case adopted the views of a certain school, and indeed adopted them in an extreme form. It is noteworthy that the court even expresses impatience with the different social philosophy which underlay the law declared unconstitutional.

Now let us turn to the minority opinion written by Mr. Justice Harlan. Beginning with a statement regarding police power and its scope, he says, "All the cases agree that this power extends at least to the protection of the lives, the health and the safety of the public against the injurious exercise by any citizen of his own rights." It is especially worthy of note that even Mr. Justice Harlan speaks of the exercise of the police power to limit contract as an interference with liberty. "Speaking generally," he says, "the State in the exercise of its powers may not unduly interfere with the right of the citizen to enter into contracts that may be necessary and essential in the enjoyment of the inherent rights belonging to everyone, among which rights is the right to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation." There is a liberty

of contract, he continues, which cannot be violated even under the sanction of direct legislative enactment. It must be a clear case, he believes, to justify interference by the courts with individual liberty. He then takes up the case of the bakers and is very much inclined to the opinion that the bakers may be placed at a disadvantage in the labour contract. He says in regard to the bakers that, "It is plain that this statute was enacted in order to protect the physical well-being of those who work in bakery and confectionery establishments. It may be that the statute had its origin, in part, in the belief that employers and employees in such establishments were not upon an equal footing and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength. Be this as it may, the statute must be taken as expressing the belief of the people of New York that, as a general rule, and in the case of the average man, labor in excess of sixty hours a week in such establishments may endanger the health of those who thus labor. Whether or not this be wise legislation it is not the province of the court to inquire." Then he quotes from the book of Professor Hirt on *Diseases of the Workers*, who speaks of the labour of the bakers as being among the hardest and most laborious kinds imaginable, because it has to be performed under injurious conditions, because it requires great physical exertion in an overheated workshop and during unreasonably long hours, and especially because of the erratic demands of the public, compelling the baker to perform the greater part of his work at night, thus depriving him of an opportunity to enjoy

the necessary rest and sleep, a deprivation injurious to his health.

Another writer quoted by him says:

"The constant inhaling of flour dust causes inflammation of the lungs and of the bronchial tubes. The eyes also suffer through this dust, which is responsible for the many cases of running eyes among the bakers. The long hours of toil to which all bakers are subjected produce rheumatism, cramps and swollen legs. The intense heat in the workshops induces the workers to resort to cooling drinks, which together with their habit of exposing the greater part of their bodies to the change in the atmosphere, is another source of a number of diseases of various organs. Nearly all bakers are pale-faced and of more delicate health than the workers of other crafts, which is chiefly due to their hard work and their irregular and unnatural mode of living, whereby the power of resistance against disease is greatly diminished. The average age of a baker is below that of other workmen; they seldom live over their fiftieth year, most of them dying between the ages of forty and fifty. During periods of epidemic diseases the bakers are generally the first to succumb to the disease, and the number swept away during such periods far exceeds the number of other crafts in comparison to the men employed in the respective industries. When, in 1720, the plague visited the city of Marseilles, France, every baker in the city succumbed to the epidemic, which caused considerable excitement in the neighbouring cities and resulted in measures for the sanitary protection of the bakers."

Mr. Justice Harlan also quotes from the Eighteenth Annual Report of the New York Bureau of Statistics of Labor, in which it is stated that "from a social point of view, production will be increased by any change in industrial organization which diminishes the

number of idlers, paupers, and criminals. Shorter hours of work, by allowing higher standards of comfort and purer family life, promise to enhance the industrial efficiency of the wage-earning class—improved health, longer life, more content and greater intelligence and inventiveness." The statute under consideration does not, in the opinion of Mr. Justice Harlan, embrace extreme or exceptional cases, and he quotes a writer on the relation of the state to labour as follows: "The manner, occasion, and degree in which the State may interfere with the industrial freedom of its citizens is one of the most debatable and difficult questions of social science."[3]

Mr. Justice Harlan continues:

"There are many reasons of a weighty, substantial character, based upon the experience of mankind, in support of the theory that, all things considered, more than ten hours' steady work each day, from week to week, in a bakery or confectionery establishment, may endanger the health, and shorten the lives of the workmen, thereby diminishing their physical and mental capacity to serve the State, and to provide for those dependent upon them. . . . A decision that the New York statute is void under the Fourteenth Amendment will, in my opinion, involve consequences of a far-reaching and mischievous character; for such a decision would seriously cripple the inherent power of the States to care for the lives, health, and well-being of their citizens. Those are matters which can be best controlled by the States. The preservation of the just powers of the States is quite as vital as the preservation of the powers of the General Government."

Mr. Justice Harlan thinks we ought to be careful about limiting unduly police power. He is very reluc-

damentally differing views, and the fact that the judges may find that statutes do not embody their own particular views should not be a basis for their decisions. "The accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

Mr. Justice Holmes makes a plea as does Mr. Justice Harlan for a wide view of police powers. Police powers interfere with liberty of contract in a variety of ways. "Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every State or municipal institution which takes his money for purposes thought desirable, whether he likes it or not." He instances the Northern Securities case [4] and refers to the Utah case [5] cited by Mr. Justice Harlan, holding that these regulations of contract are a justifiable infringement upon individual liberty. Mr. Justice Holmes, rejecting the dominant view of liberty, implies, in the last part of his brief opinion, that "the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our

people and our law. . . . Every opinion tends to become a law."

And further, "It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work."

Such, then, is the opinion of Mr. Justice Holmes. There are then some judges who agree with many other people in feeling that the courts are carrying their powers to extremes.

Let us consider, as having a bearing upon this case, the facts regarding the bakers. It has been shown that the bakers are a peculiarly oppressed class. They have not been well able to take care of themselves through individual contract. Very often, certainly in New York City, they have been foreigners, generally Germans, who have been snatched up by the employing bakers, have been kept in bakeshops for long hours, frequently not learning English at all. In short they have in times past sometimes been in a condition of quasi-slavery. They have very often been obliged to sleep in the bake rooms; indeed, it is said that sometimes they have slept in the troughs in which they mixed the bread. The authority whom Mr. Justice Harlan quotes says that they are an unhealthy class and are short-lived. These are all facts that must not be overlooked in a judicial decision, for they have a bearing upon the case when viewed from the standpoint of liberty. The

majority decision of the court is based upon a primitive theory of individualism. The bakers were without liberty in the true sense for they were without the right to health. The statute represents their struggle for liberty, for freedom from restraint and oppression. And this liberty sought for the bakers was a liberty positive, constructive, and substantial, liberty for them to employ their powers, liberty to improve their faculties, a liberty which they had never known but which they sought because of its very positiveness. And the liberty which the courts gave them was nothing that they desired or which their friends desired for them.

Let us look at the case from the standpoint of the public health. Investigations have been conducted concerning the relation between the public health and the health of employees in manufactories and the question has been asked: Where do all our contagious diseases come from? Take a case of scarlet fever, for instance. A child has scarlet fever, and it is the only case within miles and miles. It seems to have mysteriously come out of the air. It has very likely come from industrial employment, from a case in a bakery or a laundry, from ready-made clothing which had been finished in a sweat-shop, or it may have been contracted in any one of many other ways.

So we return to our thesis: that the judges' interpretation does embody a certain economic philosophy. How could it be otherwise so long as we have our constitutional system? [6]

We find that Congress has no right to impair liberty. This is quite proper; we do not want it to do so. Con-

gress has no right to deny to the individual certain rights regarded as fundamentally natural. Interpretation, however, is not always obvious. Interpretation is something which must change as economic philosophy changes, as civilisation advances. Somebody must interpret the expressions in the Constitution. Is it not proper that the legislature, in active contact with the people and coming from the people, should interpret what the liberty of the people is, rather than the court, which is so far away from the people? The Justices of the Supreme Court, having life employment and not mixing with all classes of people, are generally thought to be far from the feelings, woes, enjoyments, and views of the ordinary man.

This is a tremendously big question. Those who believe in a democracy may say that powers of interpretation belong to the legislature. On the other hand, if it is the courts that are to make these interpretations as to what favours liberty, then they should have some education in reference to the particular duties which they are to perform. They should not only know what the law is, but they should know what modern economic philosophy is. Instead of having had any thorough training in economic philosophy the courts have as a general thing absorbed a philosophy which is antiquated; for example, Blackstone's individualistic, eighteenth century philosophy: far more extreme in its individualism than Adam Smith's *Wealth of Nations*.

But we have got far from the point from which we started. It is desired to show what individual liberty means to the courts of this country. We shall return

to the power of the judges and some reasons will be adduced for the view that it is easier and perhaps better to go forward and develop the courts as final arbiters of social progress and as a highest legislative authority than to go backward, taking from the authority of the courts and increasing the authority of the legislature in the manner indicated.

[1] P. 662. Lochner *v.* N. Y., 198 U. S. 45 (1905).

Another decision that has fallen under heavy public condemnation is *in re* Jacobs, 98 N. Y. 98 (1885). It declared unconstitutional the law which prohibited the manufacture of cigars and the preparation of tobacco in tenement houses, on the ground that it was interfering with property rights. This case is perhaps the high water mark of this sort of decision. But the decision in the Ives case (Ives *v.* South Buffalo R. R. Co., 201 N. Y. 271, 1911) nullifying a well thought out scheme of workmen's compensation, has been condemned by scholars as perhaps no other decision that has been rendered. This has already been mentioned on p. 235 (Pt. I, Chap. 7).

[2] P. 668. It may be observed that everyone thinks it quite suitable to criticise the legislature and it is significant that even the courts often do so. Here we see the legislature accused of lack of honesty. Men are fined for contempt of court but there is no such legal offence as contempt of legislature. While it is true that we do not desire to place the legislative bodies on the same footing with the courts in this respect, it may safely be said that an undue readiness exists to treat them contemptuously and that it is injurious.

[3] P. 671. Jevons, *The State in Relation to Labour*, p. 33.

[4] P. 673. Northern Securities Co. *v.* United States, 193 U. S. 197 (1904).

[5] P. 673. Holden *v.* Hardy, 169 U. S. 366 (1898).

[6] P. 675. According to the views of Mr. Justice Clark of the Supreme Court of North Carolina (as expressed in his address before the Law Department of the University of Pennsylvania, entitled "Some Defects in the Constitution of the United States," April 27, 1906) legislation like this belongs to the legislature because it is the legislature which should decide upon the harmony between the laws that they pass and the Constitution. It is not for the judges, he maintains, to interpret the harmony between the laws and the Constitution. In other countries, certainly in England, it belongs to the legislative body to interpret these general principles and in their interpretation we find channels marked out through which

progress can be made. But for the view that the power exercised by judges to declare legislation unconstitutional was intended to be conferred on them by the framers of the Constitution a very strong argument is found in Beard's *The Supreme Court and the Constitution* (1912), especially Chap. III, "Judicial Control before the Ratifying Convention." But see J. Allen Smith's *Spirit of American Government* for the opposing view that the judges have grasped power which it was never intended should be conferred on them.

CHAPTER IX

THE COURTS AND CONSTITUTIONS IN THE UNITED STATES

As we have seen, in the cases of special interest to us the decisions of the judges rest, by the very nature of the case, on an interpretation of general principles, and these general principles rest on a basis of some social philosophy. The social philosophy of the American judges has up to the present rested generally upon that of eighteenth century individualism, and the development of society has made it clear that individualism is favourable to the power holding classes. The original decisions of the judges, then, rest upon subjective grounds. As there are no objective criteria, the only cause of complaint is that the social philosophy is an unsound one. The divergence in judicial decisions clearly brings out this subjective character. When questions involving fundamental principles of property and contract come before the courts, we frequently have majority and minority opinions; in some great cases, five giving a majority decision and four a minority decision. And it is frequently possible for those who are familiar with the social views of the judges to give a pretty shrewd guess in advance of the decision, as to how some of the judges will decide.

We may compare our State courts with one another.

The Massachusetts Supreme Court has perhaps until recently been the most enlightened of our courts, in the sense that it has been most liberal and progressive. Why is this so? Probably because in that State there is a high standard of education, a working away from the old social philosophy, and a more general sympathy with popular aspirations than elsewhere. In other words, the same reasons which long gave Massachusetts the leadership in labour legislation make the decisions of her judges the most enlightened and humane, simply because social philosophy and public opinion in that State have been more progressive in such matters than in other States.

But in recent years the Wisconsin Supreme Court has given notable decisions which in their broad and progressive spirit as well as in their enlightened erudition deserve to rank with those rendered in any State. We may instance the decision upholding the Income Tax Law, the great powers of the Wisconsin Commissions, the Railroad Commission and the Industrial Commission, in the Workmen's Compensation Act. Notice, for example, the quotation which follows from an opinion of Chief Justice John B. Winslow:

"Constitutional commands and prohibitions, either distinctly laid down in express words or necessarily implied from general words, must be obeyed, and implicitly obeyed, so long as they remain unamended or unrepealed. Any other course on the part of either legislator or judge constitutes violation of his oath of office; but when there is no such express command or prohibition, but only general language, or a general policy drawn from the four corners of the instrument, what shall be said about this? By what standards

is this general language or general policy to be interpreted and applied to present day people and conditions? When an eighteenth century Constitution forms the charter of liberty of a twentieth century government, must its general provisions be construed and interpreted by an eighteenth century mind in the light of eighteenth century conditions and ideals? Clearly not. This were to command the race to halt in its progress, to stretch the state upon a veritable bed of Procrustes.

"Where there is no express command or prohibition, but only general language or policy to be considered, the conditions prevailing at the time of its adoption must have their due weight; but the changed social, economic, and governmental conditions and ideals of the time, as well as the problems which the changes have produced, must also logically enter into the consideration, and become influential factors in the settlement of problems of construction and interpretation." [1]

Surely the most progressive economist and social philosopher cannot reasonably ask a judge to take a more advanced position. Noteworthy also is the earlier decision of Chief Justice Ryan, of Wisconsin, in upholding the power of the State over railway corporations.[2]

But when we say that the judges are influenced by public opinion, we have to remember that here too we have classes. It is especially the opinion of the class in which they move that is apt to influence the judges. We have to notice that the judges often appear to be far away from the masses. We notice a difference in the various courts in this respect. Some are nearer to the people than others. But after all, this nearness to the people or remoteness from them influences judicial decisions less than one would think. So also the manner

in which the position of the judge is secured does not have the effect which some suppose it has. Many thoughtful people are getting away from the idea formerly generally accepted that it is wise to appoint judges, and are inclined to favour the election of judges in order that they may be kept nearer to the people; some even want the recall for judges. The author has so far undergone a change that he does not feel so sure as he once did that appointive judges are less favourable to progress than judges elected by popular ballot. In Massachusetts the judges are appointed for life, but are as progressive as the elected Wisconsin judges [3]; but it is also to be noticed that the Constitution of Massachusetts itself is favourable to broad decisions, consequently legislation is not so much hindered by the Constitution as in some other States.

We also notice at times in our own and other countries a strong class bias of the judges. For illustration of this the reader is referred to Appendix I, Volume II, of Mr. and Mrs. Webb's *Industrial Democracy*, in which they discuss the "legal position of collective bargaining." As all know, in England no law can be pronounced unconstitutional, because the law makes the Constitution; but the judges must so interpret the laws as to make them consistent with each other; yet the English courts through their interpretation have virtually been able to overthrow what the Webbs believe must be held by any impartial person to have been the design of Parliament. From 1824 to the present time we have had in England a succession of laws the design of which was to make effective the right of workingmen to combine to

promote their common interests and to put them in a position to effect collective bargaining. But after it would seem that the right had been fully secured by legislation, some new point has been brought up, and at times it has been possible to pare down and weaken the supposedly won rights; and then Parliament has passed new laws and the new rights secured by these new laws, it is claimed, have in turn been abridged by judicial decisions.

We might also take as an illustration of this the decisions of the courts concerning common employment, to the effect that the employee cannot collect damages when they are due to a coemployee.[4] For this decision there seems to be no reason except the bias of the courts. No such doctrine is known to the law courts of France or Germany. The reader may consult the Webbs' *Industrial Democracy*,[5] and Holland's *Jurisprudence*[6] for a further discussion of this doctrine. On this general subject of the bias of the courts a case is cited by the seventh Earl of Shaftesbury in his diary. This case, however, had to do with the position of children in the factories in England. The law did not seem to be entirely clear and the judges said, "Inasmuch as this is a law affecting the rights of property, we must interpret it strictly." What did the court mean by "interpreting strictly"? It meant strictly in favour of the property and strictly against the child. The Earl of Shaftesbury said that the court might just as well have decided that this was a matter which affected the well-being of little children and we must therefore if possible interpret it in their interest. But not so. The court decided in favour

of the proprietors and against the children, and thus took from them the rights which Parliament had apparently designed to give them.[7]

In regard to the position of our courts and to the recent more liberal interpretation of the police power, mention must be made of the important Utah case, upholding the eight hour day for miners. A decision of the Supreme Court of the United States upholding this law was given in March, 1898. This is one of the leading decisions, but there are one or two others quite as broad.[8] This shows a liberal social philosophy or a tendency to work toward one.

The following newspaper editorial is interesting and instructive in this connection as giving an expression of popular opinion.

"Utah's Eight-Hour Law Held Valid

"The decision of the United States Supreme Court holding valid the Utah eight-hour law is one of great importance to the industrial and labor interests of this country. It is contrary to the reasoning of most of the State Supreme Courts upon cases involving similar points of constitutional law. The Illinois Supreme Court, more than others, perhaps, has freely nullified labor legislation on the ground of its interference with the provision of the Constitution which stipulates that no person shall be deprived of life, liberty or property without due process of law. So strict have been some of the State courts in holding that the legislature could not interfere with a person's right to contract for the disposition of his labor that workingmen had begun to despair of relief from certain grievous evils. The decision of the Federal Supreme Court in the Utah case will revive hope again in the efficacy of legislation as a means for improving

conditions under which workingmen labor. It must have a liberalising effect upon the rulings of lower courts.

"The Federal Supreme Court distinctly avoided passing upon the validity of eight-hour laws in general, but it sustained the Utah law as a proper exercise of the police power. That Act limited the hours of workmen employed in mines and in smelters to eight a day. Its justification is that labor under such conditions is so unhealthful that workers, for their own good, should not be permitted to work longer hours.

"The position of the Illinois Supreme Court upon such legislation is succinctly stated in the following excerpt from the opinion in the case of Ritchie *v.* the People:

"'The police powers of the State can only be permitted to limit or abridge such a fundamental right as the right to make contracts when the exercise of such power is necessary to promote the health, comfort, welfare or safety of society or the public; and it is questionable whether it can be exercised to prevent injury to the individual engaged in a particular calling.'

"This extract is from the opinion in the case brought to test the validity of the act of 1893, the object of which was to limit the hours of women in factories and workshops to eight a day. In declaring invalid this statute the Illinois Supreme Court went further than was necessary to establish the precise point in question, and took a position the reverse of that now enunciated by the federal court. It cited from the New York courts a decision relating to an act forbidding the making of cigars in tenement houses, in which occurs the following:

"'To justify this law it would not be sufficient that the use of tobacco may be injurious to some persons, or that its manufacture may be injurious to those who are engaged in its preparation and manufacture; but it would have to be injurious to the public health.'

"A quotation by the Illinois Supreme Court from Tiedman on *Limitations of Police Powers* is still more in point:

"'There can be no more justification for the prohibition of the prosecution of certain callings by women, because the employment will prove hurtful to themselves, than it would be for the State to prohibit men from working in the manufacture of white lead because they are apt to contract lead poisoning, or to prohibit occupation in certain parts of iron-smelting works because the lives of the men so engaged are materially shortened.'

"The reasoning which leads to the conclusion that the State has no right to interfere for the protection of life and health of workingmen who may be practically forced to accept such terms of employment as are offered them seems brutal. It is gratifying that the highest court in the land holds otherwise. This decision means the starting of the pendulum in the other direction." [9]

Whatever our attitude toward the judges, we must yield obedience to their decisions because otherwise our social order would fall to pieces. But this does not mean that the judges are beyond criticism. There are some who hold that we may abuse the legislature without limit, but that it is a dangerous thing to hint that a judge is not infallible. But these are coördinate powers, and it was not the opinion of the founders of this republic that the judges were infallible.

The question of judicial power has become acute in the United States and all progressive thinkers appear to be agreed that we must have a change. Some would have us go backward and restrict the judges to a narrow sphere. The judges, we are told, should be administrators simply, should tell us what the law is, and should not at all venture upon legislation. Legislation belongs, say the adherents of this view, to the people or

their representatives; the judges are simply agents to help carry out the popular will and they should never assume the rôle of final interpreters of social progress. This sounds plausible, but does it suggest a practicable remedy? First, observe that with the American Constitution as it exists to-day the courts have the last word and human history gives no warrant for the belief that they will voluntarily pare down their own powers, which in every crisis they are urged by powerful interests to extend, and for the extension of which they always receive applause by strong elements in the community. When the Supreme Court of the United States gave its very questionable decision against the constitutionality of the income tax it was praised by many although generally condemned by students of the subject. The judges were said to have taken and very properly, it was urged, a large, statesmanlike view of their functions and had shown themselves saviours of society.

Once more: What are we to do with the general provisions of our Constitution in regard to property, liberty, free contract, due process of law, all of which must be interpreted? They must be interpreted in some way and the interpretation means law making, legislation, the establishment of a framework within which legislation must move.

Does the recall suggest a way out? It is urged by able leaders of the progressive forces in the United States; but can it at best be anything more than a bridge to better conditions? Is there not reason to dread whim and caprice in the popular control of judi-

cial power by the recall and does not the world's history favour for the judges freedom from temporary and fluctuating blasts of public opinion? Many of the best things done by those who have leadership meet with popular disapproval at the time; certainly very many thoughtful persons, and friends of progress, as sincere as can be found, look upon the recall of judges with apprehension. The judge must take the long time view and must be free from the passions of the moment. Would it not be better to add to the number of the judges in the case of the Supreme Court of the United States until we could get a majority whose social philosophy would compel them to give the desired decision in such cases as that of the income tax, labour laws, etc., where the decision necessarily turns upon social philosophy? This would be a frank recognition of the legislative powers of the Supreme Court, and its recognition as the highest legislative authority would still give the American people the most conservative government in the world, including a highest third legislative chamber of judges appointed for life.

But to add to the number of judges, as the Lords are added to in England, may not be necessary. As the judges have such social and economic power as no other body of men have, should they not be selected with reference to their social and economic philosophy? Why should they not be openly questioned with reference to this? As a matter of fact, they are not appointed without reference to this philosophy. Although little is said about it openly, if powerful interests fear the philosophy of candidates, opposition arises to nomination

or confirmation of these candidates. Why not make the inquiry open and above-board? Is it not absurd for the American people to elect a President and Congress to carry out a certain policy and then to perpetuate arrangements whereby other men are appointed in supreme control whose social philosophy is such that they will necessarily overthrow all that the first have done?

The frank recognition of the facts would put upon the judge positive, constructive work and not merely the easier negative work. A beginning of this is seen in such an arrangement as that in Massachusetts and Maine, where the Supreme Courts are called upon in advance to give an opinion on the constitutionality of a proposed law, this opinion very properly not binding them in a concrete case after arguments have been presented on both sides. We would then say to our judges, "It is not enough for you to sit back and say, No; you must help us to do the thing we want done."

Our courts are criticised because they are ultra-conservative and because in all lands they have been in so many cases a bar to progress. But let us look at this matter from another point of view. We have divergence of social interests which is apparently, at least, very great. We have attacks on property and on vested rights, which may become serious. If the invasion of property once fairly begins, we know that we incur danger from a mob appetite which grows by what it feeds on. May it not be that it is an admirable arrangement to make our courts guardians of property and final interpreters of social progress? How did the courts attain their power in America? Is it not a

question of the survival of the fittest? On the whole the American constitutional system has worked well in spite of the Dred Scott decision and the Bakers' Case. And even bad as some decisions have been, progress in the United States has been secure and continuous; and attention has already been called to the pleasing contrast between North American history and not merely South American conditions, but even the turbulent and revolutionary history of France since 1789. Now, however, we have reached a period when more rapid progress should be compatible with stability and continuity.

But we may consider the recall of judges from a different point of view; for it is, in truth, a reactionary measure, as are so many other so-called measures of current political reform, which, instead of being parts of a truly progressive social programme, are but a harking back to conditions of primitive rural democracy, when it was supposed that every fairly intelligent man could fill every office satisfactorily and the only thing needed was to select one out of many available candidates. But this theory even in earlier days never worked well, and we have had a class of office holders, composed very largely of lawyers, they being those on the average better trained and also the ones who could most readily and with least loss take up and lay down office. Now in our complex modern life, we need highly trained experts in judicial office as well as in other offices; and to secure them we must give men careers in the public service. The recall is then a false ideal.

One reform proposed is that there should be an appeal

from the State courts when they hold that a law is in conflict with the Constitution of the United States. Now there is an appeal in case the contested State law is declared constitutional, and the present situation merely affords another illustration of the antiquated eighteenth century social philosophy of individualism under which our courts have been operating and from which they are now working away. Let us suppose a State passes a law against payment of wage-earners in kind, a so-called anti-truck payment act, and that this law is declared unconstitutional when brought before the Supreme Court of the State by an employer who pays his employees in "store-orders", and as too frequently happens in such cases virtually reduces their earnings. Now the decision reads in favour of the employee and employer alike because they are held to be protected in their liberty of contract. The employer brought suit and his right has been safeguarded or, to express it differently, the federal right he claimed has been recognised. The individualistic theory is that as rights have been secured—liberty, property, contract, due process of law, etc., no one can have a case to appeal. If the law had been declared constitutional, on the other hand, the employer could go to the Supreme Federal Court of the United States to protect his liberty and various and sundry other rights against invasion.

Could there be a greater absurdity? To such a pass may a legal fiction bring us! A realistic jurisprudence must recognise that the wage-earners have lost and that society as represented in the State has lost when the law is declared unconstitutional; and the right of appeal

should exist. This could be secured by a change in the Judiciary Act of 1789, now § 237 of the Revised Federal Code of Judiciary, 2, under which our federal courts are organised.[10]

And it is worth while at this point to consider very briefly the history of this act, which illustrates the fact that unintended and most weighty consequences of an economic character flow from statutes and constitutional provisions which are of political origin; for a pervasive social philosophy must necessarily direct the manifold expressions of our common life. The Judiciary Act was undoubtedly political in its origin. The framers and supporters of our Federal Constitution were very generally inclined to doubt the ready obedience to it of the States and their courts, and it was thought by many that State courts would be unduly inclined to pronounce laws constitutional which were in reality repugnant to some provisions of the Federal Constitution. If the State court, however, declared a State law unconstitutional, it was held that no ground for appeal existed, for that signifies the desired supremacy of federal over State views.

And those who deny that the Judiciary Act of 1789 stands for individualism call attention to the fact that the Bill of Rights (Amendments I–X) was not adopted until 1791, two years after the Judiciary Act; and it is in Article V of the Bill of Rights that we find the provision that no person "shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Now it is necessary to make careful discrimination at this point. The Judiciary Act does give expression to a dominant individualism; the Bill of Rights is not necessarily individualistic. And the provisions of the Fifth Article in regard to life, liberty, property, due process of law and just compensation are entirely consistent with the progressive social philosophy of the present time. Nothing advocated in the present work is inconsistent with this Article. The real criticism is to be directed against an unwarranted, individualistic interpretation of the Article by our courts and more particularly our State courts.

The Judiciary Act is individualistic because it gives no representation to society, but allows social rights to be decided by individual litigation solely. It signified perhaps comparatively little in 1789, but its continued existence shows the domination of social and economic individualism.

And it is true that it is the State courts which now stand for a belated individualism and it is only in a few cases that the Federal Supreme Court has erred seriously in this particular. It was in a dissenting opinion in the Slaughter House Cases in 1873 that Mr. Justice Field (16 Wallace, 36) quoted in a footnote from Adam Smith his utterance to the effect that the "patrimony of the poor man lies in the strength and dexterity of his own hands": and from Turgot, his utterance, also of 1776, that the right to labour is property and "the first, most sacred and imprescriptible of all." It was held that a regulation of the right to labour was an interference with the poor man's prop-

erty and thus these utterances were used in support of individualism.

The influence of this opinion is seen in the New York State decision, pronouncing unconstitutional the law prohibiting the manufacture of cigars in tenement houses in New York (*in re* Jacobs, 98 N. Y. 109) in 1885, in which Mr. Justice Earl quotes from Mr. Justice Field's dissenting opinion in the Slaughter House Cases; and in Illinois in Millett *v.* People, 117 Ill. 294 in 1886, in which the law providing for protection of the miners by compelling mine owners to keep scales, weigh the coal mined and keep a public record of it, was declared unconstitutional.

Surely it does not speak well for our legal education that our State courts should strongly emphasise individualism at a time when it is thoroughly discredited by experience and rejected by nearly all scientific thinkers in all lands. This brings us back once again to our law schools, which to this day are altogether too individualistic in their underlying ideas. Even in the State universities, where public purpose might be supposed to be dominant, law students are trained almost altogether for the private practice of law, for winning cases, and little, if at all, for their public duties. And in all our new measures lawyers are on this account not taking the leadership which could be desired and are sometimes said even to be losing influence. But the coming of a change is clearly seen, as is evidenced in our new departure in introducing sociological jurisprudence in the law schools.[11]

Let us now return to the right of appeal in case a State statute is held to be repugnant to the Federal

Constitution. The right of appeal might at first seem to be hardly of much avail practically; because the expressions in regard to liberty, property, etc., are found generally in the State Constitutions as well as in the Federal Constitution; and it would necessarily remain for the State courts to interpret State Constitutions. But this right of appeal would give a unified interpretation of the Fourteenth Amendment of the Federal Constitution instead of the conflicting interpretations given at present by our various State courts, and this lack of unity does violence to the ordinary man's ideas of right. And apart from this it would throw the responsibility back on the State courts which are almost universally the laggards, the most notable exception being the already cited Bakers' Case; [12] and then all that would remain would be a change in the State Constitution, which is not usually extremely difficult to compass.[13]

Let us next consider briefly the so-called recall of judicial decisions, or, to speak more properly as Ransom has pointed out, "direct popular re-definition of the scope of the 'police' or regulative powers of the State." [14] This is constitutional revision by popular decision of concrete cases instead of by enactment of general principles to be followed by their application by trained experts to specific cases. It is difficult to arrange for proper presentation of both sides of the cases, and there is danger that popular passion and prejudice might lead to decisions to be regretted hereafter by the very people who made them by their votes. It is in the treatment of general principles that the

people are most likely to reach fair, just and dispassionate conclusions. The people may well decide whether they wish to abolish private property or not; but it is better to let the calm and trained mind of a judge decide whether or not particular measures do or do not take from individuals or classes guaranteed rights.

On the other hand, a rational people will not permanently allow any body of men to stand between them and humanitarian and general progress; and if no other way out of the difficulty can be found, the people may then take into their own hands the revision of decisions in particular concrete cases.[15]

But let us consider what other measures are available which can, in the writer's opinion, be recommended without hesitation. Our Federal Constitution has sufficient elements of flexibility to meet nearly, if not quite, every situation that may arise, and this is fortunate, as it is precisely that one of our Constitutions the amendment of which is attended by the greatest difficulty. Many of these elements of flexibility are found also very generally in State Constitutions, and where they are lacking these Constitutions present no insuperable obstacles to revision. Let us consider some of these elements of flexibility.

One of the ideas standing in the way of progress is found in the antiquated notion of liberty and freedom, which arises out of an eighteenth century philosophy. One of our guaranteed rights is freedom of contract; but now what is freedom of contract? "Free", "freedom", and "liberty" are flexible words. The eighteenth century philosophy gave a formal definition to

them and this meaning, applied to particular cases, as we have seen, has carried with it oppression and servitude. But it is quite as possible to give them a constructive meaning and to recognise the coercion of economic forces, compelling men and women to do what they do not wish to do. All proper protective labour legislation by regulating contract thus adds to freedom.

Consider the flexibility of the terms, "public purpose", "public use", "public policy". The legislature may go far in defining them and enlightened courts will apply these concepts to concrete cases in the spirit and life of our century and not in the meaning given to them one hundred and more years ago. Is not beauty and symmetry a public purpose as well as the preservation of public health? If it is felt to be so by the enlightened portion of the community, it is so. And property can be condemned to promote beauty; and restrictions may be placed on the use of property for the sake of a harmonious development of a city, compensation for the servitude on private property being paid when actual and substantial damages can be shown unless, indeed, our courts stand needlessly in the way. All that we need in these cases is something very simple: namely, an interpretation of the word public which corresponds to actual conditions and is thus realistic. Our new jurisprudence, becoming realistic, will learn the meaning of social solidarity. It subserves a public purpose when land is bought by a State or city and then improved by drainage or by clearing it of stumps, or by the erection of dwellings and then is sold on the instalment plan, as in Ulm, Germany,

in order to increase the number of home-owners.[16] If the policy is well-timed and properly carried out health is promoted thereby, intelligence and thrift likewise and the soundness and stability of the whole social order, the highest public purpose, are thereby promoted.

All measures that add to the joy of life—music, art, beauty are measures which have a public purpose and all property employed for those ends has a public use.

Public health comes admittedly within the province of the police power; and jurisprudence must simply know the facts of the case, as shown by modern science. The promotion of health is always a public purpose; the health of one is not a strictly private matter and the diseased moral, mental and physical condition of half a dozen persons may result in offspring in a hundred years which will spread pauperism and crime over half a commonwealth. Here again all we ask of legislatures and courts is realism.

And then we may notice the word "reasonable" and the phrase "rule of reason", which happily our courts are now using. These terms are as elastic as one can wish. "Due process of law" is an elastic clause, to be re-interpreted anew with each stage in our economic life.

It is admitted that under the police power public health may be safeguarded and that frequently this places burdens upon property. Now we have already seen that the conception of public health is extremely elastic and that it continuously grows. It is recognised that our health is more and more a matter under social control. There is possibility of indefinite enlargement along this line, and the errors of the courts in the past

have sometimes found their cause in an inadequate appreciation of the social solidarity in the preservation of health. Here again all we ask of legislatures and courts is realism.

The right of eminent domain, giving the right of taking private property for public purposes, is a flexible right and finds its metes and bounds only in public purpose, which we have already discussed. Public purpose can no longer restrict condemnation merely to real estate. It must be extended to rights of all kinds in order to promote the public weal. There is the same reason for extending it from time to time that there was originally in its creation.

The right of taxation also adds to the flexible elements in our constitutional system. It makes it possible to pay for private property when the latter is taken to promote the public welfare, and thus, if the system of taxation is equitable, it distributes equitably the burden involved in property changes. A public loan policy will naturally receive a similar development in order to spread justly the sacrifices of changes over periods of time. There would seem to be no limit to these changes, inasmuch as, if desirable, they add to the public wealth and do not decrease it.

We want legislatures and courts to understand that we need *private property* as well as public property. It is rooted in natural law, in the sense that it corresponds to the needs of human nature as human nature has developed and must necessarily develop in a world like ours. Private property has indeed justification as a fundamental fact, resulting from human nature, or to

put it differently from what has been called "the dogmatism of the inevitable". And we have its growth in time and again time has been well called "a tap root of truth, friendship and property"; "the organism has so grown into the cleft that it cannot be uprooted without attacking its life." [17] All this we grant and already have conceded to the natural rights theory; but private property is flexible, and finds its limits in the general welfare, and thus is grounded on a firm foundation.

The very word "property" is a bundle of rights from which subtractions can and must be made from time to time, and to which additions can and must be made from time to time. It is the glory of our Constitution that we have these elements of flexibility, and it is the joint function of our legislatures and courts, but especially of the latter, to interpret, re-interpret, and again to re-interpret these fundamental ideas.

The police power as we have already seen is the general welfare power of the state under which all property is held, all contracts are made and liberty is interpreted; and in accordance with which comparatively small invasions of property and contract rights may be made even without compensation.

The police power has been called "the catch-all of legislation" and "eminent domain turned upside down", but best of all, and by Mr. Justice Holmes, "a conciliatory phrase", and all of this is in entire accord with the interpretation of the police power already given in Chapter VII of Part I on "The Police Power and Property." This idea of the police power recognises that there must be elasticity in our concepts and it is

hard to see how we can do better than to leave the determination of the limitations in the police power to properly trained judges as experts to decide how far it is desirable to go at a particular time and place and how far we may go and still retain property, contract and liberty.

We have the far-reaching and according to most courts unlimited control of property as it passes from generation to generation through the regulation and taxation of *inherited property*.

We have then every element we need already either in our constitutional systems or easily placed there, when once all our law-making, law-executing and law-interpreting bodies move out of the past into the light of the twentieth century.

What more is needed to bring about the changes incidental to social progress and indeed all changes, when once it is fully decided by the people that they want them,—even when these changes mean retrogression—for not all change is advancement—it would be difficult to see. The tools are provided—it is for us to use them soberly and wisely, and that means deliberatively in order that the changes we do decide to make may mean at the same time social progress.

Looking at the Federal Constitution from the above points of view the progressive may find his enthusiasm for the work of our fathers renewed and can begin to join in the praises which have been accorded to it by many leaders of thought in our own and other countries. The Constitution is flexible, but it has also this strong point, that it prevents wobbling back and forth from one thing to another, and makes for progress.

Turning now to the State Constitutions, attention is called to the excess of constitutionalism,—developing the Constitution so far as really to remove the power from the people. Our American theory as generally understood is that all powers withheld from the legislature are retained by the people and to a certain extent this theory is correct. But it is idle to talk of the powers which are retained unless they can be exercised. There are two lines of development, one the constitutional, and the other the referendum and initiative which in itself is less desirable, because it takes legislation away from representatives presumably chosen for their special fitness to make laws. Our constitutional development is somewhat akin to the referendum and initiative because we have to refer Constitutions to the people. The only question is, Have we a means of referring to the people easily and readily? Such is not the case. It was the early intention in the United States that Constitutions should be frequently referred to the people. That was one of the provisions of the Virginia Constitution and it is the motto on the title page of the reprinted volume containing the report of the constitutional convention of 1829, that liberty depends upon frequent reference of the law to the people. As an extreme illustration we may cite the people of Illinois who are cursed with an antiquated Constitution which can be changed only very slowly and with great difficulties, one amendment at a time; and that because its framers were so conceited as to think that they had wisdom to frame a fundamental law so good that their posterity should not be allowed to tamper with it, leaving them only the

opportunity at intervals to introduce minor changes. But here again the amending act may be changed.

Coming back to the judges again, it is undeniable that frequently when the judges are blamed, they are simply following clear constitutional and even legislative mandates, and the fault is with the people and their legislature and not with the courts. There is every reason to think, for example, that legislatures have passed bills, knowing them to be unconstitutional, in order to place the onus of declaring them so on the courts.[18] Clear and explicit provisions of the Constitutions must be enforced by the judges, under oath to support the Constitutions, whether they like them or not. And where constitutional change is so difficult as to do more than give time for well-considered action and thus really obstruct progress, the clauses which regulate the manner of change must be altered so as to make change easier. But in the main the State Constitutions are changeable when there is a real desire on the part of the people to change them, and we bid fair to see important changes made in the Federal Constitution in the near future. But the idea of our fathers of frequently bringing the Constitution back to the people for consideration, alteration, and amendment is commendable.

Here, then, are lines of reform which are evolutionary and not revolutionary and which correspond to our advanced and complex civilisation and are consistent with the rule that if we want good public servants we must encourage men to qualify themselves by suitable training and experience and then give them careers.

[1] P. 682. Borgnis *et al. v.* Falk Co., 147 Wis., 327 (1911).

[2] P. 682. Attorney General *v.* C. & N. W. Ry. Co., 35 Wis., 425 (1874). See also in this connection the following cases: M. St. P. & S. S. M. Ry. Co. *v.* Railroad Commission, 136 Wis., 146 (1908); State *ex rel.* Kenosha Gas & Electric Co. *v.* Kenosha Electric Co., 145 Wis., 337 (1911); Manitowoc *v.* Manitowoc and Northern Traction Co., 145 Wis., 13 (1911); LaCrosse *v.* LaCrosse Gas and Electric Co., 145 Wis., 408 (1911); Calumet Service Co. *v.* City of Chilton, 135 N. W., 131 (1912).

[3] P. 683. For a critical account of the American practice see Bryce, *American Commonwealth*, Vol. I, p. 505.

[4] P. 684. The fellow servant rule is being abrogated in some States by statute, *e. g.*, Ohio and Iowa. In Iowa the statute applies only to railways, and declares invalid any contract limiting the liability of a railway company for negligence of a fellow servant. The courts have upheld this statute as not unreasonable and not an unwarranted interference with liberty of contract. See Mumford *v.* C. R. I. & P. Ry. Co., 128 Ia. 685 (1905); McGuire *v.* C. B. & Q. Ry. Co., 131 Ia. 340 (1906). In the Mumford case the court says: "There is no such thing as absolute liberty of contract. Indeed, all personal and property rights are subject to proper legislative regulation and control," etc. See 128 Ia. p. 693.

[5] P. 684. Vol. I, p. 316, note 1.

[6] P. 684. In the 4th edition of his *Jurisprudence* (1888) Holland says that the doctrine of common employment "seems to be unknown on the Continent." (p. 133, note 2.) In the 11th edition of the same work (1910), however, he expresses himself as follows: "It was for many years settled English law that 'one fellow servant could not recover for injuries sustained in their common employment from the negligence of a fellow servant, unless such fellow servant is shown to be either an unfit or improper person to have been employed for the purpose'": and he adds the following note:

"Feltham *v.* England, L. R. 2 Q. B. 36. This view, first held in the case of Priestley *v.* Fowler, 3 M. & W. 1 (1837), is not wholly un-

known on the Continent. With *Parliamentary Papers*, 1886 (c. 4784), compare an instructive article by W. G. Clay, in *Journal of Comp. Legisl.* II, p. 1, especially pp. 95, 99, with reference to art. 1384 of the Code Civil. It is settled law in the U. S. See Murray *v.* S. C. Ry. Co., 1 McMullan (South Carolina) 385 (1841) and Farwell *v.* Boston and Worc. Ry. Co., 4 Metcalf (Massachusetts), 49. *Cf.* an important art. in *Michigan Law Review*, II, p. 79, on 'The Fellow-servant Doctrine in the U. S. Supreme Court (p. 154).'"

Holland shows that in England this doctrine has been modified by Acts of Parliament, especially the Workmen's Compensation Acts. On the Continent systems of insurance replace the liability of the employer and we have a similar development in the United States. It seems clear, then, that the doctrine of a common employment, in accordance with which the employer is exempted from liability, was developed by the judges and was modified by legislative acts and finally is being replaced by insurance systems, resting also upon legislative acts.

[7] P. 685. But in the development of the law the claim is made by Mr. Justice Bruce that English judges have on the whole been more humane and democratic than Parliament. "We criticise the safeguards which the criminal law affords to the defendant and the fact that they were originally judge-made. We should remember, however, that they were merely the offset to a brutal and sanguinary penal code." Article on "The New York Employers' Liability Act." *Michigan Law Review*, June, 1911, p. 687, note 7.

[8] P. 685. Holden *v.* Hardy, 169 U. S. 366 (1898).

[9] P. 687. From the *Chicago Record*, March 2, 1898. But in the Bakers' Case, discouraging as it is in other respects, the court took a more advanced position than did the Illinois Supreme Court with respect to the prevention of an injury to an individual. The Supreme Court of the United States in deciding adversely to the bakers nevertheless admitted, at any rate as *obiter dicta*, that the police power could be exercised in behalf of the individual.

[10] P. 693. Section 25 of the Judiciary Act of 1789 states:

"And be it further enacted, that a final judgment or decree in any suit, in the highest court of law or equity of a State . . . where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the U. S. and the decision

is *in favour* of such (*sic*), *their validity* . . . may be reëxamined and reversed or affirmed in the Supreme Court of the U. S., etc." U. S. *Statutes at Large*, Vol. 1, (1789–1845), p. 85.

And this provision remains in every judicial act since that time.

[11] P. 695. In this connection the following quotation from Professor Roscoe Pound, of the Harvard Law School, has especial interest as Professor Pound is the recognised leader among the few teachers of sociological jurisprudence in the United States.

"The unity of the social sciences and the impossibility of a self-centered, self-sufficing science of law are now insisted upon by sociological jurists.[a] But much remains to be done everywhere in this direction,[b] and in America we have yet to make the very beginning, except as we have learned to harness history for the purposes of legal science. For it is not long since a seventeenth-century legal history was as orthodox as an eighteenth-century philosophy of law and nineteenth-century economics are still. Freeman tells of a teacher of law who 'required the candidates for degrees to say that William the Conqueror introduced the feudal system at the great Gemot of Salisbury in 1086.' When the historian protested, the lawyer replied in all sincerity that he was examiner in law, not in history:

"'Facts might be found in chronicles, but law was to be found in Blackstone; it was to be found in Blackstone as an infallible source; what Blackstone said, he, as a law-examiner could not dispute.' [c] Holmes and Bigelow and Thayer and Ames and Maitland have made us wiser with respect to law and history. But it is still good form for the lawyer to look upon our eighteenth-century Bills of Rights as authoritative text-books of politics,[d] of ethics,[e] and of economics." [f] (*Harvard Law Review*, Vol. XXV, No. 6, April, 1912, p. 511).

[12] P. 696. Lochner *v.* New York, 198 U. S. 45.

[13] P. 696. The author begs to make acknowledgment of the kind suggestions he has received from several professors of law in the discussions of this topic and especially from Professor Henry Schofield, of the Northwestern University Law School. At the same time he wishes to disclaim putting responsibility for the views here expressed upon anyone else.

It has been held that individualism as a theory of the courts cannot be predicated before 1840 or 1850. It is doubtless true, as

above indicated, that it became pronounced in the social conflicts of the latter half of the nineteenth century; but it was in the air that our forefathers breathed. Adam Smith nowhere expresses it so crudely and unreservedly as does Blackstone in his *Commentaries on the Laws of England* which appeared a decade before the publication of the *Wealth of Nations* in 1776. Thomas Jefferson's philosophy was individualistic and doubtless he was influenced by the French Physiocrats, some of whom he knew personally. The economic life in our new world was individualistic and our economic philosophy corresponded with it. The author cannot, therefore, agree with some of his friends among the law professors who say that the Judiciary Act was not individualistic, although he does agree with them that the Bill of Rights in the particulars under discussion simply established property and contractual rights as do the fundamental laws of all civilised countries. The reason why our Federal Constitution and Bill of Rights do not establish individualism and furnish an impregnable bulwark for it now is because our forefathers were content to establish mainly general principles to be carried out and applied by succeeding generations as they might see fit. Those who desired to bind us hand and foot by constitutional restrictions were men of a later generation.

[14] P. 696. *Majority Rule and the Judiciary*, p. 100.

[15] P. 697. *Cf.* Ransom, *op. cit.*, pp. 71–73. Lochner *v.* N. Y. 198 U. S. 45 (1905).

[16] P. 699. See the author's article, "Ulm on the Danube, a Study in Municipal Land Policy, and its Provision for Workingmen's Homes" in *The Survey*, December 6, 1913.

[17] P. 701. Davis *v.* Mills, 194 U. S. 451 (1904), at p. 457; Dunbar *v.* Boston and Prov. R. R., 181 Mass. 383, 385, (1902).

[18] P. 704. See article by Mr. Justice A. A. Bruce on "The New York Employers' Liability Act" in the *Michigan Law Review* for June, 1911, especially pp. 686–7. On the latter page in note 7 we find this utterance: "The American courts, indeed, are constantly being made the cats'-paws of the politicians. They are being constantly blamed for a lack of sympathy and democracy and for overruling the judgment of the legislatures when they are merely reflecting the popular conscience and the popular will and are doing the very thing which the legislatures themselves expected them to do."

The following notes indicated by a, b, c, d, e and f, are references given in the above quotation from Professor Pound's article, numbered note 11.

[a] " ' The error of the classical conception was in looking upon law as a science isolated from the others, self-sufficient, furnishing a certain number of propositions the combination whereof ought to provide for all needs. In reality the law is only a resultant. Its explanation is outside of itself. Its sources must be sought elsewhere.' Vander Eycken, *Méthode positive de l'interprétation*, 112 (1907). 'Nothing is more fallacious than to believe that one may give an account of the law by means of the law itself.' Roguin, *La règle de droit*, 8 (1905). See also Bosanquet, *Philosophical Theory of the State*, 36 *et seq.* (1899).

[b] " Kantorowicz, *Rechtswissenschaft und Soziologie*, 8 (1911).

[c] "Freeman, *Methods of Historical Study*, 73–74. Compare with the foregoing: 'The report of the commission . . . is based upon a most voluminous array of statistical tables, extracts from the works of philosophical writers and the industrial laws of many countries, all of which are designed to show that our own system of dealing with industrial accidents is economically, morally, and legally unsound. Under our form of government, however, courts must regard all economic, philosophical, and moral theories attractive and desirable though they may be, as subordinate to the primary question whether they can be molded into statutes without infringing upon the letter or spirit of our written constitutions.' Ives v. South Buffalo R. Co., 201 N. Y. 271, 287, 94 N. E. 431, 437 (1911). 'Of course, economic, moral, and philosophical theories of today could have no more bearing on the reading of the text than historical study of today, in the mind of Freeman's teacher, could have upon the legal dogma as to what was legal history!'

[d] " People *v.* Coler, 166 N. Y. 1, 14, 59 N. E. 716, 720 (1901); Low *v.* Rees Printing Co., 41 Neb. 127, 135, 59 N. W. 362, 364 (1894); State *ex rel.* Zillmer *v.* Kreutzberg, 114 Wis. 530, 537, 90 N. W. 1098, 1101 (1902).

[e] " Durkin *v.* Kingston Coal Co., 171 Pa. St. 193, 202, 33 Atl. 237, 238 (1895); Hoxie *v.* New York, etc. R. Co., 82 Conn. 352, 359; 73 Atl. 754, 757 (1909). 'I am indebted to Professor Munroe Smith

for calling my attention to a notable example in the minority report of a committee of the Bar Association of the City of New York upon a proposition for amendment of the state constitution so as to permit the enactment of a Workmen's Compensation Act. The report says: "We must begin by ourselves understanding that the constitutional provisions which are contained in our bill of rights in the state and federal constitutions are moral principles, as weighty in moral authority and as vital to the safety of society as any that have ever been promulgated, not even excepting the golden rule. After that, we must teach the people. We must make *them* understand that constitutional rights are moral rights, and that whatever experiments they may try in modes of social organization, they must never try any experiments which will imperil those moral rights. We must make them understand that once they tamper with the security of those moral rights they will, like Samson, wreck the social structure and be themselves crushed in the ruins. There is no duty resting upon the lawyers of today which is higher than the duty to resist to the uttermost any effort at amendment of our constitutions which shall endanger in the slightest degree the moral principles in the bill of rights, or which shall permit any man's property to be taken under any pretext without due process of law, or which shall extend to any man anything less than the absolutely equal protection of the law" '. Report of Special Committee . . . to consider the Question of an Amendment to the Constitution of the State of New York Empowering the Legislature to Enact a Workmen's Compensation Law (Dated 27 December 1911, p. 17.)

[f] "'A law that restricts the freedom of contract on the part of both the master and servant cannot in the end operate to the benefit of either.' People *v.* Coler, 166 N. Y. 1, 16, 59 N. E. 716, 721. (1901)."

CHAPTER X

CONCLUDING OBSERVATIONS ON CONTRACT: I. THE NEW FEUDALISM AND OLD CONTRACTUAL RELATIONS OF DEPENDENCE: II. LIMITATIONS OF CONTRACT WITH RESPECT TO TIME: III. THE REVISION OF CONTRACTUAL RELATIONS: IV. THE SOCIAL SUPERVISION OF CONTRACT AN INDISPENSABLE CONDITION OF LIBERTY.

I. *The New Feudalism and Old Contractual Relations of Dependence.*

When we see how many forms of oppression are possible under unregulated contract, we are not surprised to find that the dependence that finds its seat in contract is designated as the "new feudalism," a term justified by the greater significance of contract in modern times.[1] The economic struggles of the present are largely struggles in the field of exchange and they terminate in contracts which reduce to terms of unfree dependence the weaker party in the contractual bargain. Professor Sinzheimer finds that a new era begins in Germany about 1890. The exchange-struggles, as we designate the struggles between buyers and sellers, have become collective, and have increased in extensivity and in intensivity. Groups bargain with groups, and instead of individual contracts, we have printed contractual forms which apply to entire groups. No

longer do the strong merely utilise a given situation to their advantage, but they create the situation which reduces to dependence the other party to the contract. It is prescribed how the purchaser may sell and how much he must buy and quantities and qualities of wares to be purchased are dictated so that the retailer, for example, must purchase a supply for a longer period than he wishes. He is bound for years. A contract sometimes provides for rebates, a part payable at the end of the year and a part withheld to force an exclusive contract for another year. The German Cartel in the alcohol business is cited. Contracts were made in 1902 which compelled the purchaser to buy his supply up to 1908 of members of the syndicate, and at a price still to be determined.

Equally striking is the dependence which contracts have established or attempted to establish in the United States by the aid of patents. Some of these endeavours have been sanctioned by the Supreme Court of the United States and others have been overthrown by its decisions. The first case is that of The Dr. Miles Medical Co. *v.* John D. Park & Sons Co. (220 U. S. 373, 1911). In this case the Supreme Court decided against the attempt of the manufacturer to restrict the right of sale, the court holding that the manufacturer could not be allowed to fix prices at which the retailer should sell the product. In the so-called Mimeograph case (Sidney Henry *v.* The A. B. Dick Co., 224 U. S. 1), decided in March, 1912, it was ruled that a man not only had a right over the patented article, but could dictate supplementary articles to be used with that article and

would have redress in case the man to whom the patented article was sold did not fulfil the contract to use specified goods with the said article.[2] In the "Bath-Tub" case, (Standard Sanitary Manufacturing Co. *et al. v.* The United States of America, decided November 18, 1912) the right of an owner of a patented article to control the unpatented product of that article was denied and it was stated also that patents and contracts based on them could not nullify the provisions of the Sherman Anti-Trust Act. Also the idea of reasonableness was given weight. Other citations could be given illustrating these points. [Morgan Envelope Co. *v.* Albany Perforated Wrapping Paper Co., 152 U. S. 425 (1894) and Wilson *v.* Simpson, 9 Howard 109 (1849).]

It has already been stated in this book that it is a peculiarity of the labour contract that the labourer binds himself and must render his service with his person, whereas the seller of other wares has only a temporary connection with the purchaser. Professor Sinzheimer points out the fact that the new feudalism frequently reduces to likeness the two classes of contracts, namely, labour contracts and contracts binding retail dealers; for the weaker party, namely, the retail dealer, is fettered year in and year out by oppressive conditions, and is kept in a continual state of dependence.

The new feudalism, however, reaches its full development when the dependence it connotes is crowned by a benevolent despotism, with characteristics both good and bad. An employer, for example, builds homes for

his working people which they must occupy.[3] Thus the wage-earners often have better houses than they could otherwise afford, but are bound by additional contractual ties of dependence. A corporation furnishes insurance, mitigating many hardships of life for the workingman and his family, but this insurance is enjoyed only as a result of continuous employment, which in turn often involves oppressive dependence. Especially is this true when after a number of years the workingman has acquired rights which may be lost by change of employment; thus the burden may become very great with increasing years as new employment with insurance becomes more and more difficult to secure. The period between forty-five and fifty is then a very critical one.[4]

The dependence of contract reaches its worst phase in the so-called "white-slavery", which, we are told, also seeks the use of contractual forms. Next above this, we find ordinary slavery of the old type. Illustrations are given and they could be multiplied indefinitely. Typical of the effects of direct poverty is the case of Armenia in 1898, as described in a circular issued by missionaries. One missionary says, "I heard of a father in Zeitoun who was determined to sell his children—Circassians are always ready to buy children—to prevent the whole family perishing." China also affords illustration in abundance of sales contracts ending in slavery, especially in case of the distress attending flood and famine. Voluntary contract must then sometimes be forbidden in order to avoid slavery. Roscher refers to a law of 1266 forbidding voluntary slavery, showing

how ancient is this evil. At one time a law was passed (*Edictum Pistense*) permitting one who had thus made himself a slave to redeem himself by paying back the purchase money and twenty per cent. In 1812 a Himalayan offered himself to the traveller Moorcroft to escape famine. Compare also such cases under Joseph in Egypt (Genesis, xlvii, 18–23) and the Mosaic legislation concerning one who did not desire to be free. Solon in Athens, according to Roscher, was the first to prohibit the poor from selling their children into slavery to avoid seeing them starve. Slavery due to contract has been so common that one great jurist of the seventeenth century, Pufendorf (1632–94), explained slavery as arising out of contract.[5]

Peonage contracts in our South and some of the contracts for the services of Italians made by them with their padrones would perhaps come next.[6] From the reports of the United States Immigration Commission we learn that those labouring in shoe-shining establishments in this country are often peons, "but as the elements of indebtedness and physical compulsion to work out the indebtedness are missing, peonage laws cannot apply." [7] As the Greek shoe-shining industry contains probably the most extensive and most serious system of peonage now in existence in this country, the grave importance of the inadequacy of our present legislation is evident. That such conditions exist as are found among the young Greek boys who come to the United States and are without the reach of the law, is proof that we have not yet attained true freedom of contract.

The Immigration Commission found conditions of

peonage, second in seriousness, existing in the lumber camps of Maine where labourers are compelled to remain at work in the lumber camps, through the instrumentality of a law passed in 1907. This law makes it a crime for one to enter into an agreement to work for a lumber company, receive an advance of money or transportation and "unreasonably and with intent to defraud" fail to work out his indebtedness. The law is often so strictly enforced, it is alleged, as practically to annul the phrase "unreasonably and with intent to defraud" and has occasioned no little hardship. Negative legal protection has sometimes been afforded those who have simply placed others in slavery or held them there, as no federal statute could be found effective in such cases.[8] Other cases of peonage through the South and the West have grown out of misrepresentations of employment bureaus and have been more or less illegal.

In 1901, cases of contracts involving the service of negroes came before Judge W. C. Bennett of Columbia, South Carolina; the form of the contract including the following:

"I agree at all times to be subject to the orders and commands of said or his agents, perform all work required of me or his agents shall have the right to use such force as he or his agents may deem necessary to compel me to remain on his farm and to perform good and satisfactory services. He shall have the right to lock me up for safekeeping, work me under the rules and regulations of his farm, and if I should leave his farm or run away he shall have the right to offer and pay a reward of not exceeding $25 for my capture and return, together with the expenses of same, which amount so advanced, together with any other indebtedness, I may

owe at the expiration of above time, I agree to work out under all rules and regulations of this contract at same wages as above, commencing and ending

"The said shall have the right to transfer his interest in this contract to any other party, and I agree to continue work for said assignee same as the original party of the first part."

Judge Bennett, commenting upon this contract, said that although nominally a free contract it reduced the labourer to a position worse than slavery.[9] Much has been written about peonage in the far South in recent years, and even aggravated cases have come before the courts. In its worst form, it means that negroes are sentenced to pay fines for trivial or even nominal offences, and then, unable to pay these fines, they are sentenced to work them out for long periods for private employers. It appears that they are often kept in debt by private employers, and then are forced to continue in a condition of servitude to pay for the debts. These peons are kept under guards and in some cases they have been shot for attempting to escape. The following is a copy of an actual peonage contract, fictitious names being substituted for the originals. It is said by legal officials of the federal government to be "typical of all. It embraces all the material clauses and provisions contained in all."

"ALABAMA 'PEONAGE' CONTRACT"

"State of Alabama.

"Tallapoosa County.

"This contract and agreement entered into on this 7th day of January, 1903, by and between John Smith and Joe Black, both of said State and county, witnesseth:

"That the said Black hereby hires himself to the said Smith as a farm laborer on the farm of said Smith in Tallapoosa county for a term of 12 months, beginning on this date and ending on the 7th day of January, 1904.

"Now the said Black hereby promises and agrees to do good and faithful work for said Smith during said term and agrees to remain on the premises of said Smith during said term; to do such work as said Smith may direct, and not to absent himself from said premises without the consent of said Smith; and in the event said Smith shall deem it necessary to keep said Black confined during said term, he shall have full authority under this contract to do so. And the said Black hereby acknowledges the receipt of $25 on said services, which amount is paid by said Smith and received by said Black upon said Black's agreement to work as herein agreed.

"Now the said Smith hereby agrees to accept said Black into his services and to pay him the sum of $4 per month during said term, and has this day advanced said Black the sum of $25 upon said Black's agreement to work as herein set forth and agreed.

"WITNESS our hands this the 7th day of January, 1903.

Witness: John Smith.

"John Brown. Joe Black."

The writer has already pointed out elsewhere [10] that it is impossible to draw the line as theorists were once inclined to do at adult males and say that their contracts need no protection at the hands of society. We have done well in following the rule of the sea—women and children first—in our protective labour legislation; but experience shows cases in which men's contracts need regulation and protection; and the state is concerned in the well-being of men as well as of women and children.

Certain professions seem to be peculiarly exposed to

oppression under contract forms; here the theatrical profession would perhaps come first. Theatrical contracts in the United States and in Germany and probably in every country illustrate what has been called the new feudalism. The reason is obvious. Contracts, as we have seen, are the media through which inequalities in bargaining power find expression; and the theatrical profession, as a whole, is economically weak; but this weakness is confirmed, established and strengthened by prevailing contract forms. In Germany, where the matter has perhaps received more careful attention than anywhere else, it is clearly recognised that no reform of the evil conditions under which actors and actresses toil can be at all satisfactory unless it includes among other things a social regulation of contracts; therefore long and earnest discussion has been given to a proposed Imperial Theatre Law (*Theatergesetz für das Reich*), which shall cover the most essential points of the contracts with actors and actresses and establish a framework within which the details must be arranged. The friends of the measure hope that it may soon become a law. An improved contract has been drawn up by the Society of German Actors and Actresses (*Genossenschaft deutscher Bühnen-Angehöriger*) and has been voluntarily used by a few directors of theatres before the legal adoption of the proposed law. There lies before the author an actual contract between an actress and a theatre in a great German city; several points deserve notice.

First, it is the employer who draws up the contract and presents it to the employee. This at once shows in-

equality, but it is not necessarily an undesirable inequality, as a certain amount of authority is necessary to secure organisation and the nature of the case causes this to rest with the employer. Second, it is printed with only a few blank places left for individual specification. We have here an illustration of the truth that in modern times contracts are mostly type contracts and not individual contracts. According to one estimate over ninety per cent. of the labour contracts to-day are type contracts. While this can scarcely be more than a rough estimate, perhaps even "a guess", the present author scarcely thinks it an exaggeration. Third, the contract covers four large and mostly finely printed pages and is justly described as a labyrinth of conditions, such as to give almost complete power into the hands of the employer. Fourth, the small wage is to be noticed, namely thirty-five marks a month the first year, and sixty marks a month for the second year, or about $100.00 for the first year and $175.00 for the second year, if employment is continuous. But the poor creature makes herself liable to fines of over $65.00 during the first year and of about $95.00 during the second year as penalties of many sorts, and it is easy for the employer to reduce pay and to cancel the contract in a great number of contingencies. The actress has very little security of tenure.

Under the contract there seems little if any limit to the length of working time which may be exacted. The actress must furnish regularly all costumes, but for actors an exception is made in the case of historical costumes. The management practically dictates cos-

tumes, and this one clause in the contract perhaps drives more actresses to a bad life than does any other clause.

A second general provision prohibits actresses from marrying, but not from having relations as mistresses with lovers. Complaint is also made of the harsh provisions in the contracts whereby illness entails immediate loss and early dismissal, the actress having less protection in this respect than domestic servants have, and being at the same time far more dependent.

Of course mere changes in contract forms are not sufficient, and the association already mentioned has taken other measures to advance the interests of the theatrical profession, while a committee of ladies is particularly interested in improving the condition of German actresses, centering especial attention upon the gathering together of wardrobes out of which costumes are to be provided at small expense to the actresses; they also look to the care of the children of actresses, so generally woefully neglected.

Furthermore, it is to be observed that ruinous competition has often rendered the management unable to pay a living wage and to provide decent conditions for the actors and actresses. It is not, however, regarded as objectionable, if by the establishment of a higher economic and ethical level, those theatres are obliged to close their doors, which are not able to reach this level.

The American contractual conditions are apparently not one whit better—probably on the whole worse—although wages are doubtless much higher. The conditions are also labyrinthine and are very generally in

favour of the employer, exposing the employee to frightful oppression, except in the case of the comparatively few who are so high in the profession that they can alter the contract and in rare cases perhaps dictate it.[11] At the same time, we do not hear of any widespread attempt [12] to better the contract of this important and needy class, which has great and only very partially developed possibilities of social service; and in the United States we could not have a federal law as Germany can.

This is illustrative of conditions of dependency, rooted in contract; and volumes could be filled with other illustrations. Is it not, then, plain that no social reform can be complete which does not include careful social regulation of contracts? And in the United States this must be secured through commissions more or less similar to the Wisconsin Industrial Commission, which gives us the most promising beginning we now have.[13]

Baseball contracts also need regulation. We hear of buying and selling players and this is doubtless not so bad as it seems, for it means sale of contracts for their services and does not always carry with it any oppression; sometimes, indeed, it is in this way that a player receives increased pay. But the contracts are too one-sided, as we may gather from the following clauses found in many of these contracts:

"The compensation of the party of the second part stipulated in this contract shall be apportioned as follows: Seventy-five per cent. thereof for services rendered and twenty-five per cent. thereof for and in consideration of the player's covenant to sanction and abide by his reservation by the

party of the second part for the season of (the next year), unless released before its termination. . . .

"It is further understood and agreed that the party of the first part (the club) may at any time after the beginning and prior to the completion of the period of this contract give the party of the second part (the player) ten days' written notice to end and determine all its liabilities and obligations under this contract, in which event all liabilities and obligations undertaken by said party of the first part, in this contract, shall at once cease and determine at the expiration of said ten days; the said party of the second part shall thereupon be also freed and discharged from obligation to render service to said party of the first part." [14]

Thus it will be seen that in the league in which a player performs every club has a claim on his services. The clubs must waive such claim before he can leave that league. In addition, when once the player signs a baseball contract, he binds himself perpetually to the magnate through the clause which gives the magnate an option on his services for the next season; while his employer can dispose of the player immediately by giving him ten days' notice.[15]

However, baseball contracts have been modified as a result of the decision of a Federal Circuit Court.[16] The "reserve clause" has in many cases been modified to state more specifically the salary and conditions of service, while the so-called "ten-day clause" has been declared practically invalid in the decision referred to, because of lack of mutuality in the contract.

In spite of the attempts of the courts to give them protection, baseball players, like actors, are held to these one-sided contracts. The reason for these con-

tracts is to be found in the economic inequality between the two parties in the contracts and the monopolistic or semi-monopolistic position of the employers. The employee either can find no other employment or can find only employment of inferior rank or position, for example with a baseball club not in the regular leagues.

Next we have to consider the contracts of great combinations, particularly those of a monopolistic nature, with retail dealers, whereby they are bound to carry out the will of the combinations. Trust investigations in our country have made us familiar with these contracts, most of which are now clearly illegal. One contract widely used was that whereby manufacturers of cigarettes bound the retail dealers to sell only their own trust products. The Sugar Trust and the Beef Trust are alleged to have used contracts to reduce retail dealers to dependence and to strengthen their own monopolistic power.

By one-sided and oppressive contracts public service corporations seek to bind those who use their service. A railway ticket carries with it a form of contract to which one is supposed to assent in the purchase of the ticket; so also telegraph blanks on which one writes a message. In the new Union Station in Washington, D. C., a placard is posted informing the general public that when one sends one's baggage over the railway lines one thereby consents to a limitation of liability of the railway for damage to said baggage to a sum named. Receipts given by American express companies carry with them long and skilfully worded contracts to which one is assumed to assent in making use

of their service. But in all these cases the general public is perfectly powerless, as to the use of the services of these corporations, for this use is compulsory, the compulsion proceeding from economic and other conditions, and there is no choice; or if two corporations offer the same service, there is agreement as to these onerous and often unjust contracts which are forced upon the public.

It cannot be said that the law affords no remedy. The evil is due in part to the ignorance of the law. The great weight of American judicial authority is to the effect that there can be no limitation of liability even as to amount, unless the matter, even if not specifically agreed upon, is brought home to the shipper, and that the rates charged are based upon the limited liability. A judge writes to the author as follows: "I had a case, for instance, when in practice, where the express receipt limited the liability to $5.00. The goods were lost and I proved that they were worth $10.00. The company tried to limit me to a recovery of merely $5.00. I proved, however, that although my wife who took the receipt had mistakenly put the value at $5.00, the real value was $10.00 and there was no difference in the rates and charges of the express company as between a $5.00 shipment and a $10.00 shipment; in other words, that I had paid just as much as I would have paid if the goods had been worth $10.00, and there was therefore no consideration for the contract (if contract it was) limiting liability. When I raised the point, the express company settled with me for $10.00 rather than have the matter litigated. I am quite satisfied that if it had been litigated I would have won."

But in addition to the ignorance of the law, an evil is found in the difficulty in the application of the remedy. In the case of railway transportation and public utility corporations, we have begun the control of contractual conditions by commissions, but this control must go much further in the regulation of contractual relations.[17] No contracts should be forced upon the public except those approved by these commissions, seeking to hold a just balance between purchaser and seller.

It is the function of industrial commissions to scrutinise labour contracts carefully in order to prevent oppression and degrading conditions. Especially should contracts binding minors be carefully examined and in many cases forms should be prescribed. An illustration is afforded by the law of 1911 now existing in Wisconsin for apprentices and recently published by the Industrial Commission, whose duty it is to see that this law is enforced.[18] It is quoted in full to show the number of points which must be considered with reference to this one sort of contract. It represents a new type of contract which will become common, with the design either of checking or of breaking up the new feudalism which under the *laissez-faire* policy must necessarily continue its pernicious growth. The contracts for apprentices in Wisconsin are prescribed in content and form as follows:

"Section 2377. Every contract or agreement entered into between a minor and employer, by which the minor is to learn a trade, shall be known as an indenture, and shall comply with the provisions of sections 2378 to 2386, inclusive, of the statutes. Every minor entering such a contract shall be known as an apprentice.

"Section 2378. Any minor may, by the execution of an indenture, bind himself as hereinafter provided, and such indenture may provide that the length of the term of the apprentice shall depend upon the degree of efficiency reached in the work assigned, but no indenture shall be made for less than one year, and if the minor is less than eighteen years of age, the indenture shall in no case be for a period of less than two years.

"Section 2379. Any person or persons apprenticing a minor or forming any contractual relation in the nature of an apprenticeship, without complying with the provisions of sections 2377 to 2387, inclusive, of the statutes, shall upon conviction thereof, be punished by a fine of not less than fifty nor more than one hundred dollars.

"Section 2380. It shall be the duty of the commissioner of labor, the factory inspector or assistant factory inspectors to enforce the provisions of this act, and to prosecute violations of the same before any court of competent jurisdiction in this state.

"Section 2381. Every indenture shall be signed:

(1) By the minor.

(2) By the father; and if the father be dead or legally incapable of giving consent or has abandoned his family, then

(3) By the mother; and if both the father and mother be dead or legally incapable of giving consent, then

(4) By the guardian of the minor, if any.

(5) If there be no parent or guardian with authority to sign, then by two justices of the peace of the county of residence of the minor.

(6) By the employer.

"Section 2382. Every indenture shall contain:

(1) The names of the parties.

(2) The date of the birth of the minor.

(3) A statement of the trade the minor is to be taught,

and the time at which the apprenticeship shall begin and end.

(4) An agreement stating the number of hours to be spent in work, and the number of hours to be spent in instruction. The total of such number of hours shall not exceed fifty-five in any one week.

(5) An agreement that the whole trade, as carried on by the employer, shall be taught, and an agreement as to the time to be spent at each process or machine.

(6) An agreement between the employer and the apprentice that not less than five hours per week of the aforementioned fifty-five hours per week shall be devoted to instruction. Such instruction shall include:

(a) Two hours a week instruction in English, in citizenship, business practice, physiology, hygiene, and the use of safety devices.

(b) Such other branches as may be approved by the state board of industrial education.

(7) A statement of the compensation to be paid the apprentice.

"Section 2383. The instruction specified in section 2382 may be given in a public school, or in such other manner as may be approved by the local board of industrial education, and if there be no local board, subject to the approval of the state board of industrial education. Attendance at the public school, if any, shall be certified to by the teachers in charge of the courses, and failure to attend shall subject the apprentice to the penalty of a loss of compensation for three hours for every hour such apprentice shall be absent without good cause. It shall be the duty of the school officials to coöperate for the enforcement of this law.

"Section 2384. It shall be lawful to include in the indenture or agreement an article stipulating that during such period of the year, as the public school shall not be in ses-

sion, the employer and the apprentice may be released from those portions of the indenture which affect the instruction to be given.

"Section 2385. If either party to an indenture shall fail to perform any of the stipulations, he shall forfeit not less than ten nor more than fifty dollars, on complaint, the collection of which may be made by the commissioner of labor, factory inspector or assistant factory inspectors in any court of competent jurisdiction in this state. Any court of competent jurisdiction may in its discretion also annul the indenture. Nothing herein prescribed shall deprive the employer of the right to dismiss any apprentice who has wilfully violated the rules and regulations applying to all workmen.

"Section 2386. The employer shall give a bonus of not less than fifty dollars to the apprentice, on the expiration of the term of the indenture, and also a certificate stating the term of the indenture.

"Section 2387. A certified copy of every indenture by which any minor may be apprenticed shall be filed by the employer with the state commissioner of labor."

II. *Limitations of Contract with Respect to Time.*

Attention must next be directed to the general limitations of contract with respect to the future. Contracts must be limited in this direction, but the continuity of life must be preserved. This limitation is especially applicable with reference to state contracts. The state may not make a contract which will involve an abolition of its right to make contracts for the future, or it will tie the hands of the future. From this standpoint the Dartmouth College case was criticised. The tendency of the decision in that case ties the hands of the state and enables one generation to contract away the rights of another. Now, how to reconcile this idea with the

continuity of economic life is another matter and involves much care and thought. It is a complex problem, because life is complex. Treaties fall under this general head. Bluntschli and Mill held that a treaty should not be binding for more than one generation, but this is perhaps too extreme a position. Another point is this: the relation of the citizen to the state is not one of free contract. This is brought out with sufficient plainness in political science and elsewhere.[19]

Still another point is that *public necessity, public welfare, and public policy are above private contract.* Suppose we have a drafting into the army. Can a person escape the draft and secure exemption by pleading a private contract? Of course not. This simply shows a recognition of the principle that public necessity is above private contract. Contract involves the very sovereignty of the state, which is seriously impaired if private contract stands above the state's policy duly expressed in Constitutions and legislation. This is clearly recognised by our courts.

Free contract for the economic relations of citizens must be the rule and we want to educate men to the point where they may be given the utmost possible freedom of contract; but in the meantime we must not overlook the actual facts which exist, and remember always the cruelty of the theory of the equality of all men.

III. *The Revision of Contractual Relations.*

What shall we say concerning the revision of contractual relations in bankruptcy? Sidgwick does not favour it. He would discourage all bankruptcy laws

relieving a bankrupt from his obligations. He says that a discharged bankrupt should remain in a position of marked social inferiority, that he should be deprived of political franchises, and that legal immunity should depend upon the bankrupt's name being kept on a public register.[20] This is not a sound economic or moral view. I buy certain goods of you. You know what the bankruptcy laws are and you sell me the goods, taking the risk of my becoming bankrupt. If you think there is any special risk you have in the price an insurance premium with a higher rate of interest for deferred payments. If you then lose, have you any right to complain? Can you say that you have been cheated? On the whole, a bankruptcy law is better for society, because it enables men who have made mistakes through ignorance or carelessness or through circumstances over which they have no control, to turn over what they have to their creditors, to wipe out the past, and begin over again with hope. If the old debts hung over them, they would be so discouraged that they would not have heart to begin again. It is economic justice to wipe out the past in the case of honest bankruptcy and let a man begin over again, rather than to discourage him by keeping his name in a public register and depriving him of political franchise. By such a course there is nothing to be gained, but everything to be lost.

IV. *The Social Supervision of Contract an Indispensable Condition of Liberty.*

While free contract must be the rule, liberty demands the social regulation of many classes of contracts. Regulation of contract conditions means establishing

the "rules of the game" for competition. It must be done by legislation, and the enactments of legislation must be carried out largely by federal and State commissions of various sorts. It is a condition of freedom. The necessity for this springs from human nature and from the conditions existing in the kind of world in which we live. This regulation thus conforms to what in the true sense may be called natural law—law corresponding to the nature of things—whereas the old *laissez-faire* theory is opposed to natural law, if we employ that expression in any realistic sense.

What is especially needed now is the development of the theoretical principles and statute laws of fair and unfair competition and through these principles and laws to build up a framework within which contracts must be kept. This idea of fair and unfair competition has been more highly developed in Germany than elsewhere; but even there it is probable that scarcely more than a beginning has been made; while in the United States nearly the whole work of that development lies in the future. But without this development it is not easy to see how combinations can be restrained and a free field for industry maintained. The further treatment of this particular topic belongs in those parts of the present work as planned which deal with custom, competition and monopoly.[21]

[1] P. 711. See article by Professor Ludwig Sinzheimer, of the University of Munich, on "Der Kampf gegen den neuen Feudalismus" ("The Struggle against the New Feudalism") in *März* (Munich), Heft 40, October 3, 1911; also his "Wirtschaftliche Kämpfe der Gegenwart" ("Present Day Industrial Struggles"), in *Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im deutschen Reich*, 32ter Jahrgang, Erstes Heft, 1908. In the latter, Professor Sinzheimer describes excellently and at still greater length some of the main features of the new feudalism.

The term as employed in the present work has, however, a somewhat wider scope than in Professor Sinzheimer's articles. For an earlier use of the term new feudalism see also Brentano's *Gesammelte Aufsätze*, Vol. I; *Erbrechtspolitik; Alte und neue Feudalität* (*Collected Essays; The Inheritance of Property; the old and new Feudalism*), 1899.

[2] P. 713. This decision has done much to stir public opinion, and some modification of the patent laws may be looked for.

[3] P. 714. See *ante*, Part II, Chap. 6, p. 640.

[4] P. 714. An extreme view of this relationship between employer and worker is given in the following extract from a letter of the late Mr. George F. Baer, President of the Philadelphia and Reading Railway Company, to Mr. W. F. Clark, of Wilkes-Barre, Pennsylvania, written July 17, 1902, during the Anthracite Coal Strike:

"I beg of you not to be discouraged. The rights and interests of the laboring man will be protected and cared for—not by the labor agitators, but by the Christian men to whom God in His infinite wisdom has given the control of the property interests of the country, and upon the successful Management of which so much depends." Extract from a photographic copy of the letter.

[5] P. 715. For a discussion of this subject see Roscher, *Principles of Political Economy* (tr. from the German by John J. Lalor, 2 Vols. 1878), Vol. I, pp. 209, n. 5; 210; 213, n. 4; 221, n. 1.

[6] P. 715. Peonage is defined in the *Century Dictionary* as: "A form of servitude existing in Spanish America. It prevailed espe-

cially in Mexico." According to Webster it means "a debtor held by his creditor in a form of qualified servitude, to work out a debt." Peonage has come, however, to mean popularly more than the condition of a peon thus described. It embraces certain classes of contracts found in various parts of the country which reduce those held by them to a condition of great dependence amounting at times to virtual slavery and sometimes to slavery of a particularly cruel kind.

The following notes give judicial definitions of peonage and cases in which are revealed efforts to evade the intent of the federal law against it.

"Peonage is a form of servitude by which a peon or servant who is indebted to his employer is compelled to remain in the latter's service until the debt is discharged." *Cyclopedia of Law and Procedure*, Vol. XXX, p. 1382.

"It was the exercise of dominion over their persons and liberties by the master, or employer, or creditor, to compel the discharge of the obligation, by service or labor, against the will of the person performing the service." District Judge Jones, in Peonage Cases, 123 Fed. R. 671, at p. 679 (1903).

"The condition of peonage . . . means the situation or status in which a person is placed including the physical and moral results of returning or holding such person to perform labor or service, by force either of law or custom, or by force of lawless acts of individuals unsupported by local law, 'in liquidation of any debt, obligation, or otherwise.' The phrase 'condition of peonage' means the actual status, physical and moral with the inevitable incidents to which the employee, servant, or debtor was reduced under that system, when held to involuntary performance or liquidation of his obligation—the effect thereby produced upon the person, liberties, and rights of a man held in such a situation." *Op. cit.*, at p. 679.

"Peonage is the unlawful holding of a man in involuntary servitude, compelling him to labor for another against his will, in liquidation of a debt, and this compulsion may be exerted either by force, threats, or intimidation, but the jury are instructed that the force exerted, of whatever kind, to constitute peonage, must be such as to subdue and constrain the will, and must have been wilfully and knowingly exerted by the defendant." District Judge Brawley,

in charge to the jury in U. S. *v.* Clement, 171 Federal Reporter 974, at p. 977 (1909).

"The act (of Georgia) approved August 15, 1903 (*Acts*, 1903, p. 90), entitled 'An act to make it illegal for any person to procure money, or other thing of value, on a contract to perform services, with intent to defraud, and to fix the punishment therefor, and for other purposes,' is not repugnant to the constitution of Georgia, nor to the constitution of the United States, for any of the reasons assigned in the demurrer to the accusation based upon a violation of the terms of the said act. . . . Inasmuch as the act above referred to was not void as being unconstitutional the detention of the defendant under the sentence of the court upon his conviction of the offense of being a common cheat and swindler under the provisions of said act was not illegal." Townsend *v.* The State, 124 Geo. 69, Headnote, 1, 3 (1905).

Thus it will be seen that fraudulent intent makes it possible to sentence one to forced labour.

Under the Alabama Act (*Acts*, 1900–1901, p. 1208, § 1) if a party contracts in writing to perform labour for a given time or to rent land for a certain time and subsequently breaks such contract without the consent of the other, and then if during the term of the first contract he works for another, it is made a penal offence not to notify the second of his first contract. Another act provides heavy penalties for the second employer if he should employ the party when said party has notified him of the first contract. In the Peonage Cases (123 Fed. 671, 1903) this act was held unconstitutional by the United States District Court as being merely a coercive weapon to force the performance of the contract.

In the case of U. S. *v.* Clement (171 Federal Reporter 974, 1909) the plaintiff's claim was that the defendant threatened to prosecute him under the labour contract laws of the State of South Carolina, and by such threats he was induced to continue working to pay off the indebtedness; and the court held this to be peonage, stating its view as follows:

"Inducing a person to labor in payment of debts by threats of prosecution may constitute intimidation and amount to peonage, if by reason of the different character of the parties such threats overcame the will of the servant and the service was involuntary." (p. 974, headnote).

[7] P. 715. U. S. Immigration Commission, *Abstracts of Reports*, 1911, Vol. II, p. 406.

[8] P. 716. *Op. cit.*, pp. 446–447.

[9] P. 717. Ely, *Evolution of Industrial Society*, pp. 407–408. One of the most recent publications on this subject is *Slavery and Peonage in the Philippine Islands*, by Dean C. Worcester, published at Manila by the Government of the Philippine Islands, 1913.

[10] P. 718. "Economic Theory and Labor Legislation," an address delivered as President of the American Association for Labor Legislation, December 30, 1907 (reprinted from the *Papers and Proceedings* of the Twentieth Annual Meeting of the American Economic Association). In it appear the following paragraphs:

"But until recently economists were inclined to limit regulation of labor conditions and especially hours of toil to children, young persons, and women, leaving adult men 'free', so it was said, to make their own contracts. But experience has shown conclusively that while adult males as a rule are in a far better position in the labor contract than the classes just mentioned, unregulated contract does not always conduce to freedom and fair opportunity—'the square deal'—but frequently means bondage and degradation. A realistic political economy must recognize the facts of the actual world, and does so.

"Adverse conditions are often so strong for classes of adult males that well-considered and strongly enforced legislation is necessary to secure freedom from the bondage that would result from them if uncontrolled by social regulation; for here, as so generally, the purpose of statute law is to assist men to gain control over the cruel and tyrannical action of uncontrolled nature and society." (pp. 20–21).

[11] P. 722. Until the last revision of this work was practically completed, it was not possible for the writer to procure the American contracts that he desired; and the obstacles placed in his way suggest something not desirable. Theatrical agencies generally refuse absolutely to give blank forms. Actors and actresses appear to be afraid to furnish their contracts. Several times the writer has received promises of newspaper men to supply contracts, but no one of those who have promised has been in a position to furnish the contracts. At last after efforts of several years a manager has been found who has supplied the desired contracts. The writer has found it more difficult to secure American theatrical contracts than

any other contracts. Nothing could present more drastically oppressive contractual conditions of degrading dependence than a very frequently used contract from which the following clauses are quoted:

"THIS AGREEMENT, made and entered into this.....day of.....nineteen hundred and.....by and between.....Theatrical Manager, of the City, County and State of New York, party of the first part and..... actor or actress, party of the second part.

"WITNESSETH, That the said party of the second part, in consideration of the payments to be made by the party of the first part at the time and in the manner hereinafter specified, and of the sum of One Dollar to him or her in hand paid, the receipt of which is hereby acknowledged, hereby agrees and contracts to render his or her services to the said party of the first part at such times and places in the United States and Canada as the party of the first part may direct, during the theatrical season of 19.. and 19.., said season to commence and terminate at the option of the party of the first part.

"Said services of the party of the second part to be as an Actor or Performer, including both general and special work, 'General Business,' and in choruses, but more especially as he or she may be assigned in the theatrical company or companies designated by the party of the first part.

"The party of the second part hereby represents and asserts his or her competency and ability to fulfill the services hereby contracted for, to the entire satisfaction and approval of the party of the first part, failing which, at the election of said party of the first part this contract is to immediately become null and void, without any liability accruing or attaching against the party of first part thereby.

"The party of the first part agrees to pay to the party of the second part, when above-mentioned services are faithfully rendered at all performances given, including all Sundays, all holidays, all matinees and all night performances, together with any other extra performances customary at any Theatre or Hall where the party of the second part may be directed to appear, the sum of..... Dollars per week, except as is hereinafter provided, and all cost of said employee's railroad and steamboat fare and transportation of

baggage, except the following: Fare to opening point, fare after closing performance, sleeping, or parlor-car fare, carriage hire to and from hotel, station or theatre, charges for excess baggage, and fares within Greater New York; said employer is not to be liable for the loss, damage or miscarriage of any baggage belonging to said employee.

"It is agreed that the party of the second part shall receive and accept one-half regular salary for the first week of regular performances in full of all claims for that week.

"Should said company or said employee not be able to perform, through accident, sickness, delay on railroad, riot, fire, railroad accidents, public calamity, other unforeseen cause, or layoffs, then said employee is not to receive any salary for time so lost, and is to receive no compensation or expense money during or for rehearsals or for time used in traveling; said employer may omit performances, or lay off the company or said employee, at and for such times as may seem advisable to said employer, for which time no salary is to be paid and may temporarily close the season the week preceding Christmas and the last two weeks in Lent, and no salary shall be paid for the time closed, and should such weeks or any part thereof be played, said employee shall accept and be entitled to receive only one-half of the pro-rata salary for the time so played, based upon the number of evening performances given in each of such weeks. The temporary laying off as above referred to shall not in any manner abrogate this contract.

"This contract may be cancelled and said employment terminated at the election of either party at any time without cause, upon giving two weeks' notice, and may be cancelled by said employer immediately or otherwise, upon notice at any time in case of bad business, or any other cause, necessitating, in the judgment of said employer, the abandonment of the play or tour, or the disbanding of the company; and may be cancelled by said employer without cause, immediately or otherwise, upon notice at any time before, during or after rehearsals and before the first public performance contemplated by this agreement; and may be cancelled by said employer without cause, immediately or otherwise, upon notice given at any time during the first week's public performances. If for any reason whatsoever this contract is cancelled by either party, the said employee shall pay all railroad fares from the city in which they

close to their home or next objective point. The party of the first part being responsible for fares of the said employee during the actual tour of the company and not thereafter.

"Said employee is subject to immediate dismissal for absence at any time from a rehearsal or performance on account of sickness or otherwise, without being excused in writing, or for inattention to business, carelessness in the rendering of characters, intoxication on or off the stage, or being guilty of a violation of any of said rules and regulations, in any of which cases all claims for compensation, salary, wages, deposit, security, or damages shall be deemed waived and relinquished by said employee.

"It is further agreed that the party of the second part shall and will furnish all costumes required, and dress all character parts in a first-class manner, as designated by, and to the entire satisfaction of the party of the first part.

"It is also agreed that should the party of the first part elect to furnish said costumes or money for the purchase thereof, such costumes so furnished or bought are and shall be the property of the party of the first part, and the title to same shall remain in the party of the first part until such costumes are entirely paid for by the party of the second part, as follows: The party of the first part, or his representative, shall retain one-half of the weekly salary of the party of the second part until such costumes or other indebtedness of the party of the second part is entirely paid for; and authority is hereby given to the party of the first part to retain one-half of such salary of each and every week. Should this contract be broken or annulled before such costumes are entirely paid for as is herein provided, then such payments as have been made shall be considered as rental for the use, wear and tear of such costumes, and retained by the party of the first part.

"Said employee shall loan to said employer such part or all of the costumes of any or all parts played by said employee, to be used by such substitute as said employer may select to play said parts at any time during the continuance of this contract, and be on hand promptly at all rehearsals and at railroad stations on the departure of the company and travel with the company at such hours and by such routes and conveyances as said employer may select."

If the entire contract were given, the reader would find other bad conditions of employment to which unfortunate people are obliged

to submit. A marginal comment on this contract form made by an experienced manager reads as follows: "While inequitable, it must be remembered that many irresponsible people are engaged in this line of the theatrical business, and that they must be held with a strong hand for mutual good." The line referred to is that of "variety" performers, to which the contract applies. This observation is doubtless true, but it shows the necessity of the social regulation of theatrical contract in the interest of all concerned, in so far as these really desire the rights and the elevation of the theatrical profession.

Ordinary theatrical contracts are not so bad as the one given, which is probably one of the most inequitable labour contracts of modern times. The general conditions may be summarised as follows, the information being taken from a newspaper article, "The Theatrical Contract," which appeared in the *New York Times* of September 29, 1912, and which was furnished the author by a friend, an actor, as reliable and accurate in its main features.

Printed contracts are offered to the applicant for a position in the theatre, and these must be signed at once without question. If the applicant does not sign there are plenty of others waiting who are glad to do so. The manager binds himself only to a slight extent. He agrees to pay railroad fares, to give two weeks' notice before discharge, and to pay a certain salary from which, however, for various causes deductions may be made. The player, on the other hand, agrees to a great many conditions which place him under serious obligations without corresponding rights. The actor is engaged for a play to begin on or about a certain date; but if the play is abandoned he has no claim for salary. Many cases of hardship occur under this clause. Under another clause the manager has a right to withdraw a play by giving two days' notice. Another clause permits the manager to make serious deductions from the actor's salary when, for any reason whatever, it is not possible to give a performance. One clause provides for half a week's salary for various weeks, as the week before Christmas, Holy Week, the week of the presidential election, etc.; but another clause permits the employer to demand the playing of any number of performances without additional salary. It is not necessary for the manager to give reasons for discharging an actor if he gives two weeks' notice in writing.

While these and other provisions may not be legal—while perhaps

the entire contract might not hold before a court of law—yet the ordinary theatrical player, like the ordinary baseball player, is helpless. If suit is brought no further employment is possible. Real intimidation is the actual condition.

The conditions mentioned in the article are in general agreement with those found in several contract forms in the possession of the writer. The best of these contract forms is one under which a junior member of the New Theatre, of New York City, was engaged. This provided for an engagement of not less than four nor more than thirty-eight weeks, and the management obligated itself to give two weeks' written notice to the artist after the expiration of the minimum period of four weeks in order to cancel the engagement. It is also provided that the management may not demand more than eight performances in any week without additional salary. The good intentions of the management are shown in the brevity and simplicity of the contract.

It is much to be hoped that an association like the Genossenschaft Deutscher Bühnen-Angehöriger (Association of German Actors and Actresses) may be formed. The Secretary of the Women's Committee of the Association, Frau Helene Riechers, is glad to furnish information to all who desire to help those who belong to the theatrical profession, which should be a noble one. Her address is Schriftführerin, Frauen-Komite der Genossenschaft deutscher Bühnen-Angehöriger, Berlin SW. 68, Charlottenstrasse 85, Germany.

It must be understood that famous actors and actresses and the great opera singers are able to make their own individual contracts. The writer was very much amused by a conversation with one of the best known singers of our time who claimed that theatrical and operatic contracts were all that could be desired. "If I do not like the contract which is submitted, I send it back and ask to have it changed. When it comes to me again, if it still is not satisfactory, I return it and ask for further changes. I keep on returning it until it is satisfactory and sometimes this will take several weeks!"

[12] P. 722. An Actors' Equity Association has at last been formed, of which Mr. Francis Wilson is president. It aims to remedy abuses in the theatrical profession. It has made demands with respect to contract as follows:

"First, that transportation expenses to and from all points 'on

the road' and the city in which a company is organized be provided to all members of a company.

"Second, that no actor shall be forced to give more than three weeks' rehearsals without compensation.

"Third, that there shall be a two weeks' notice of dismissal.

"Fourth, that there shall be extra pay for extra performances, and full salary for all weeks played.

"Fifth, that actresses shall not be forced to bear the expenses of an unlimited stage wardrobe."

It is said that these demands have been complied with by several managers. See Editorial "An Actors' Trade Union," in *The Outlook*, for January 3, 1914.

[13] P. 722. See reports of the Commission, to be obtained by addressing the Wisconsin Industrial Commission at Madison; also the books *The Wisconsin Idea*, by Dr. C. J. McCarthy, and *Wisconsin: An Experiment in Democracy*, by Dr. Frederic C. Howe, both of which appeared in 1912.

[14] P. 723. *Chicago Evening Post*, February 25, 1912.

[15] P. 723. See above. As early as 1882 a case involving the contract relation of club and player (Alleghany Base Ball Club *v.* Bennett, 14 Fed. 257, 1882) came before the United States Circuit Court for the Western District of Pennsylvania, wherein it was held that a baseball player who had signed an agreement to execute, between certain future dates, a formal contract to play baseball for a certain club during its season, could not, by a bill of equity, be compelled to execute the formal contract, or enjoined from contracting with or playing with another club.

A similar view was held in the cases of Metropolitan Exhibition Co. *v.* Ewing, 7 L. R. A. 381, 42 Fed. 198 (1890) and Metropolitan Exhibition Co. *v.* Ward, 24 Abb. N. C. 393, 9 N. Y. Supp. 779 (1890). In a still later case [Kelly *v.* Herrman, 155 Fed. 887 (1906)], it was held that the provisions of the national agreement of 1903, and of the rules of the national commission thereby created, which gave a club the right to "reserve" such of its players as it desired for another season or to sell them to another club, in the absence of any stipulation to the contrary in the contract between the parties, were not binding.

In the case of American Base Ball and Athletic Exhibition Co. *v.* Harper, 54 Cent. L. J. 449 (1902), the Circuit Court of the City of

St. Louis held that in view of the provisions of the Missouri Constitution, declaring that all persons have the natural right to life, liberty, and the enjoyment of the gains of their own industry, and prohibiting slavery or involuntary servitude except as a punishment for crime, a court had no power to enforce the performance of a contract for personal services. It said:

"It is the wish and pleasure of the defendant to serve his present employer. In doing this he exercises the right of choosing his own associates and serving whom he sees fit, going at his own pleasure, following his chosen occupation, and enjoying the gains of his own industry. These are the natural rights of free men, and go to make up the 'liberty' which the constitutional provisions in question guarantee and protect. And it would seem that they are rights which cannot be bartered away by either contract or consent, because all provisions of agreements in contravention of law are void." For a discussion of this subject, see art. on "Baseball and the Law," by L. A. Wilder, of the New York Bar, in *Case and Comment*, August 1912, especially pp. 153–154, 155–156.

[16] P. 723. See decision of the Federal Circuit Court, sitting at Grand Rapids, Michigan, rendered April 10, 1914, and reported partially in the *Chicago Tribune*, April 11, 1914, p. 17. The case is that of the Federal League of Professional Base Ball Clubs *v.* the Philadelphia National League Club *et al.*, popularly known as the Killifer Case.

[17] P. 726. The ideal of those who framed the law creating the Wisconsin Railroad Commission, as stated to the author in conversation by the Honourable William H. Hatton, one of its principal creators in the State Senate, was that it should be sufficient for any one having a grievance against a railway company of the State to write a postcard to the Commission, directing attention to his trouble, with the assurance that his case would be fairly considered. This is an excellent ideal but one difficult to realise in practice. But even a movement in this direction indicates real progress.

[18] P. 726. *Laws* of 1911, c. 347.

[19] P. 730. Even Adam Smith with all his adherence to the eighteenth century philosophy of natural law recognised this clearly enough. See his *Lectures on Justice, Police, Revenue and Arms*, ed. Cannan, pp. 11–12.

[20] P. 731. Sidgwick, *The Principles of Political Economy*, 2d

ed. (London and New York, 1887), Bk. III, Chap. III, pp. 430–431.

[21] P. 732. The part dealing with Custom and Competition is in manuscript. The subject is discussed briefly in some of its phases in the author's *Evolution of Industrial Society*. The subject of Monopoly is discussed in the author's *Monopolies and Trusts*, which he hopes to be able to revise and enlarge.

APPENDIX TO CHAPTER X

CONTRACT AND SOCIAL PROGRESS IN ENGLAND

What is given in this appendix is based upon T. H. Green's *Liberal Legislation and Freedom of Contract*,[1] and is a mere illustrative historical fragment.[2] The occasion for the discussion of this subject by Green was found in the opposition to the two liberal measures brought before Parliament in 1880. One was the "Ground Game Act" which prohibited contracts between the owner of the land and the occupant for transferring to the former the exclusive right of killing hares and rabbits on the land rented by the latter. Such contracts were at that time common in England; the owner of the land contracted with his tenant that he was to have the exclusive right of killing hares and rabbits on the ground. The other measure was the "Employers' Liability Act." This did not, as later acts have done, prohibit employers and employees from contracting themselves out of its operation, but it was urged that men should look to the protection of contract and not to the government, thereby weakening, it was urged, their self-reliance and lowering themselves in the scale of moral beings. So Green takes this occasion to discuss the matter in general with reference to actual or proposed liberal legislation.

He takes up the question in relation to factory acts, education acts, and to laws relating to public health, every one of which limits contract. Then he refers to the Irish land laws, which materially limited contract, although they were then far from having reached their ultimate development. He also discussed legislation giving greater security of tenure to English farmers; further, liquor laws relating to contract, and the proposed local option. All these laws and reforms were resisted, he says, "in the sacred name of liberty".

Green goes on to remark that political reformers formerly urged reform in the name of individual liberty and he explains the well-known reasons for this. Their object was human welfare and this is the passion of the present day reformers as well. Yet strangely enough these present day reformers are resisted in the name of individual liberty, which was the rallying cry of the earlier reformers. But there was no inconsistency. The circumstances simply have changed. Since the great Reform Act of 1832, extending the franchise, the political history of England may be divided into three periods. The first extended to Sir Robert Peel's administration in the forties. During this period we have the struggle of free society against privileged close corporations, with the achievement of representative municipal government against close bodies. We have also the overhauling of old and ancient charities, placing them under public control and some of the grosser abuses in the Church were removed. Various reforms of this kind were effected, such as the abolition of pluralities and sinecures and the reform of cathedral chapters. There

was nothing in these reforms which was opposed to the doctrine of freedom of contract. Vested interests were respected in the changes. "Parliament," says Green, "had then as now quite a passion for compensation."

In the second period, even into the sixties, there was a struggle against monopoly. The Corn Laws were overthrown, and taxes were removed from knowledge, from newspapers, etc. With the exception of land, free transfer of commodities was secured. The immediate object of the free trader who carried things before him was free contract.

The third period began with the more democratic Parliament of 1868. Beginning with this period we have restrictions on contract. Indeed factory acts had begun earlier, but they were extended during this period and became more effective in restricting the working hours of children and young persons. They were at first imperfectly put in force, but gradually there was better administration and the working hours of women were limited. After the second Reform Act of 1867 the restrictions on the length of the working day were extended to every kind of factory and workshop. Except as half-timers children were allowed nowhere save in agriculture. Then by the Education Act of 1870 came compulsory education. The freedom of contract was thus greatly limited for children.

During these three periods, then, there was precisely the same aim—human welfare—but the means for the attainment of this end differed. In the last period protection to life and limb was secured by rules which interfere with freedom of contract. Working hours were

limited to ten, so that women, young persons and children could not make the contracts they might otherwise wish to make. Incidentally there was interference with respect to grown men; certainly in the textile industries. If we restrict the right of contract on the part of women and children, very frequently when they stop working the men must stop working too. They could not make the contracts which they would otherwise wish to make and yet the laws may be carrying out their wishes. Any one individual might wish to contract for twelve hours but when the law limits the possible working day for all to ten hours, then no one wishes to contract for more. So we have protection to life and limb secured by rules which interfere with freedom of contract.

It must be remembered in this connection that it is only through the guarantee of society that property exists and that in the interests of society this guarantee is afforded under conditions which promote the welfare of society. Green says, "No contract is valid in which human persons, willingly or unwillingly, are dealt with as commodities, because such contracts of necessity defeat the end for which alone society enforces contracts at all." Other contracts are open to the same objection, even if less obviously. In England the labour contract has been restricted and limited on account of the peculiarities which attach to this contract and these have been discussed in a previous chapter. It is "to prevent labour from being sold under conditions which make it impossible for the person selling ever to become a free contributor to the public good", that restrictions are imposed which are elsewhere unnecessary.

So we have sanitary regulations of factories and workshops, regulation of the hours of women and children, compulsory education, etc.

One question suggests itself. Could not these ends be secured without trenching on the sphere of free contract? No. Not taking human beings as they are. Under certain Utopian conditions, yes. Under real conditions, no. The law of compulsory education is not a constraint to those who willingly send their children to school. The law against women working in coal mines is not a constraint to those who do not want their wives to work in the coal mines. "Left to itself," Green says, "or to the operation of casual benevolence, a degraded population perpetuates and increases itself."

We find also that land has its peculiarities as well as labour, and these peculiarities of land justify certain limitations of contract with respect to land,—restrictions with respect to settlements and to the binding up of land through the "dead hand". These restrictions are all in behalf of the public interest. "No man's land is his own for purposes incompatible with the public convenience." We come back again to the "Ground Game Acts". The reason for proposing that such contracts as these should not be tolerated is that they lead to a waste of produce and to the discouragement of good husbandry, also to "widespread temptation to lawless habits which arise from a sort of half and half property being scattered over the country without any possibility of its being sufficiently protected."

We next consider the case of the regulation of relations between landlords and tenants. We must consider

the superior economic and social position of the landlord, especially under conditions like those which used to obtain in England; the long habit of domination on one side, and of dependence on the other. "The great majority of English farmers hold their farms under the liability of being turned out without compensation at six months' or a year's notice." In Ireland with its small farmers and few industries the conditions are still worse and free contract is only a name. The peasant farmer, it is alleged, is scarcely more free to contract with his landlord than is the starving labourer to bargain for good wages with a master who offers him work.[3]

We have then these conclusions. To strike at the roots of all contract is to strike at the foundation of society. "To uphold the sanctity of contracts is doubtless a prime business of government, but it is no less its business to provide against contracts being made, which from the very helplessness of one of the parties to them, instead of being a security for freedom, become an instrument of disguised oppression."

Restraints on the freedom of sale of intoxicating drinks and the effectual liberation of the soil were two great and pressing needs in England at that time. Wise restraints on free contract with respect to intoxicating beverages increase the total amount of freedom. Liberty can be allowed only as it is not an impediment to social good.

Speaking of the factory acts, etc., in England, Green says that as a matter of fact, "The spirit of self-reliance and independence was not weakened by these acts; rather it received a new development. The dead weight

of ignorance and unhealthy surroundings, with which it would otherwise have had to struggle, being partially removed by law, it was more free to exert itself for higher objects." This dead weight being lifted from the wage-earners, they were raised to a position in which they were freer in the making of contracts and in their bargaining.

Notes to Appendix to Chapter X

[1] P. 745. *Miscellaneous Works*, Vol. III, pp. 365–386.

[2] P. 745. If we enter upon a general historical treatment, we must go far beyond all contemplated limits of space; but the brief sketch of Green brings out general tendencies so clearly as to justify the present discussion of it.

[3] P. 750. The Ground Game Act has long been in force and appears now to meet with general approval; but the situation of landed property has greatly changed since Green wrote his essay. The former Irish tenants are becoming occupying owners through government aid in purchasing their farms, while the owners of agricultural land in England and Scotland are very largely an impoverished class, if we except first those who have collieries, secondly those who own urban property and thirdly those who have married heiresses. Recently agriculture has become more prosperous in Great Britain, but as a result of tours in the summer of 1913 it appears to the author that the tenant farmer is receiving the benefit of this prosperity to a far greater extent than the land owner. And the timidity of the tenant farmer and his dread of asserting himself in his dealings with the land owner were nowhere observed by the author in his recent agricultural tours. This is not the place to discuss this subject further, and this note is added merely to correct an erroneous impression which is generally found in the United States and which would naturally be strengthened by what Green says.

PART III

APPENDIX I

VESTED INTERESTS [1]

PART III

Note to Appendix I

[1] P. 753. This treatment covers to some extent the ground of property and contract, but from a different point of view. On this account and because it is so fragmentary it is made merely an appendix to this volume. The same remarks apply to Appendix II. The term vested interests is used as identical with vested rights.

CHAPTER I

VESTED INTERESTS DEFINED AND DESCRIBED [1]

The following is a formal definition of vested interests: *Strictly speaking, vested interests are economic interests which are legally recognised to be such that they cannot be impaired by public action, directly or indirectly, without indemnification.* This indemnification need not necessarily be out of the public treasury; it may come from the treasuries of private corporations.

Also the term "vested interests" is used more loosely to mean the claim that an economic interest should receive such recognition, also to mean the claim for indemnity for an economic interest injured by general social movements, especially by social progress.[2]

Let us now consider various points in these definitions. An interest is vested when it must receive indemnification, if it is impaired by public action directly or indirectly. If a railway company is authorised by law to impair vested interests, for example, an interest in property, we have there an indirect impairment of vested interests by public action. That is, the law permits the impairment, but not without indemnification. But if a private corporation impairs vested interests it may be compelled to make good the impairment, for the indemnification does not necessarily come out of the public treasury.

We also have vested interests used in a more loose sense to mean the claim that an interest should receive such recognition as when workmen have talked about having a vested interest in some skill or special advantage. They say, "We have a vested interest." But they have not, because their interest has not been legally recognised to be such that it cannot be impaired without indemnification. They make the claim, however, that this should be so, thus using the term vested interest more loosely.

This term is also used to mean a claim for indemnity on account of an interest which has been injured by general social progress. This is closely connected with what has gone before. Social progress at times injures certain classes and these sometimes claim that they should receive an indemnity therefor.[3]

Vested interests are largely property interests. The recognition of an interest as a vested interest gives it some of the attributes of property, and by American courts it would be comprised in their very inclusive concept of property. We discuss here, however, only the circumstances under which economic interests are recognised, or are to be recognised, as binding for society. The ordinary forms of property need not occupy us. We have simply to discuss the validity of claims of vested interests especially in cases where they are called in question.

Otherwise than through property vested interests generally arise through contract. Attention is called to a distinction made in the Roman law between *obligatio ex contractu* and *contractus*. *Contractus* means the agree-

ment itself. *Obligatio ex contractu* means that which results from the agreement; this is vested interest. Ordinarily we do not make this fine distinction between the two.

Apart from clear and explicit contract, vested interests arise through custom and usage, through continuous enjoyment, especially for a long period, as vested interests acquired through prescription. Particularly in older countries we find such vested interests and they tend to grow up everywhere.

The whole question of vested interests is closely connected with legislation which affects past economic rights; and to some extent, at least, the question of vested interests is identical with this legislation which acts backward, which takes away rights. To what extent is such legislation permissible? And what must be the indemnity? Lassalle in his work *Das System der erworbenen Rechte* discusses such legislation. There are many declarations against retroactive legislation which relates strictly to conduct, but similar principles apply in general to legislation regarding economic interests. From Lassalle we take two or three statements of principles.

In the French Constitution of June 24, 1793, under "Rights of Man" we find, "to give retroactive effect to a law would be a crime." [4] This is applied to criminal law only. And the French Constitution of August 22, 1795, declares, "No law, criminal or civil, may be given a retroactive effect." [5]

According to the Prussian code of Frederick the Great *Publikationspatent zum allgemeinen Landrecht*, 5.

Febr. 1794, "A new law may not be applied to past cases." [6]

The Constitution of the United States permits no bill of attainder and no *ex post facto* law; popularly this applies to any law, civil or criminal, with a retrospective effect; but strictly under our constitutional system it applies to criminal law and it either makes that a crime which was not a crime before or it increases the penalty.[7]

The following quotations, taken from Black's *Law Dictionary*, state the situation in the United States very clearly and bring out the distinction between *ex post facto* legislation and that which is merely retrospective:

"The plain and obvious meaning of this prohibition is that the legislature shall not pass any law, after a fact done by any citizen, which shall have relation to that fact, so as to punish that which was innocent when done; or to add to the punishment of that which was criminal; or to increase the malignity of a crime; or to retrench the rules of evidence, so as to make conviction more easy. This definition of an *ex post facto* law is sanctioned by long usage. 1 Blackf. 196.

"The term '*ex post facto* law,' in the United States Constitution, cannot be construed to include and to prohibit the enacting any law after a fact, nor even to prohibit the depriving a citizen of a vested right to property. 3 Dall. 386.

"'*Ex post facto*' and 'retrospective' are not convertible terms. The latter is a term of wider signification than the former and includes it. All *ex post facto* laws are necessarily retrospective, but not *e converso*. A curative or confirmatory statute is retrospective, but not *ex post facto*. Constitutions of nearly all the States contain prohibitions against *ex post facto* laws, but only a few forbid retrospective legislation in specific terms. Black, *Const. Prohib.*, §§ 170, 172, 222.

"Retrospective laws divesting vested rights are impolitic and unjust; but they are not '*ex post facto* laws,' within the meaning of the Constitution of the United States, nor repugnant to any other of its provisions; and, if not repugnant to the State Constitution, a court cannot pronounce them to be void, merely because in their judgment they are contrary to the principles of natural justice. 2 Paine, 74." [8]

But, of course, if retrospective legislation should impair the value of private property it would, generally speaking, require indemnification; for other clauses in the Constitution would apply and especially would it be an infringement of that part of the Constitution which is directed against taking private property without due process of law. Exceptions would in general come under the police power which in some cases may be so exercised as to impair the value of property. Another illustration is afforded by improvements which must be paid for by special assessments; for these sometimes very materially decrease the value of a man's property.

Denmark had what was called a vested interest in the Sound, between Denmark and Norway and Sweden, but this has been abolished. After the fall of the Hanseatic League the Danish government assumed the right to levy toll and as a condition of renouncing the rights accepted a commutation of three and a half million pounds from the commercial nations chiefly interested.

Some illustrations of vested interests in older countries follow. "Leeds in Great Britain was theoretically compelled to grind its corn, grain and malt at the lord's mill down to 1839, and actually had then to pay £13,000 to extinguish this feudal due." [9] In fact many vested

interests have been connected with feudal arrangements and feudal dues. There was frequently an obligation on the part of those living in a certain district to make use of the mill of the feudal lord, and a corresponding right on the part of the lord; this was regarded as a vested interest.

In the change from feudalism to the present social order the feudal lords had to be at least partially indemnified for what they lost on account of the change. Their rights were regarded as vested interests. The family of Thurn and Taxis, to mention a case already cited, had what was recognised as a vested interest in the post-office. The presidents of the Prussian private railways were indemnified when the railways were purchased by the government, receiving something like one million marks for their offices.

England is the classic land of vested interests. Vested interest in offices was recognised, in the army particularly, to such an extent that an office could be sold. That has, however, been done away. It is quite generally true that when an office is abolished in the older countries of the world a compensation is recognised and granted. This is so in England, and very often in this country if we want to rid ourselves of a man we abolish the office. But if a man has what is recognised as a vested interest then he must be indemnified; this would be very generally the case in Germany and England. Also in the older countries of the world, care is often taken to provide new work for those who have lost old positions in any branch of the public service, including the wage-earner. This is humane, and if the idea is

properly carried out, it not only results in lessening suffering but improves the public service.

We have two conceptions of an office. One is that it is a trust, and the other that it is a vested interest. Sometimes our political parties are inclined to look upon office as a vested interest instead of as a trust. This is something different from permanency of tenure or pension in case one loses one's office. The latter might be the same in immediate pecuniary effect, but these are two different points of view.

In this country vested interests resting on contract and property receive a recognition accorded nowhere else; otherwise as a rule they are given but slight respect.

In England and the United States saloon keepers sometimes claim a vested interest in their business and in England plans for temperance reform generally include indemnity to saloon keepers.[10]

In this country we give licenses to saloons to emphasise the fact that they do not have a vested interest and they may continue in the business only so long as the license lasts. Some would say that notwithstanding the license they still have a vested interest and ought to be indemnified. Victoria in Australia gives compensation if a license is withdrawn, the compensation being drawn from certain pecuniary penalties and, if necessary, from the proceeds of a special tax. In Switzerland distillers were compensated for the diminished value of buildings and plant due to the law of 1887.[11] Street car companies are pushing the recognition of the doctrine of vested interests and sometimes evince a disposition to carry this doctrine to an unwarrantable extreme,

even when the charters expressly limit the duration of the life of the corporation. This would be clearly an abuse of the idea of vested interests and if they do secure a recognition of this right it will mean the triumph of an abuse of rights rather than the evolution of new views.

But notice this,—that vested rights and interests begin to be discussed when we have a change in the industrial order. It is then that vested interests and the term or word for vested interests come forward.

Notes and References to Chapter I

[1] P. 755. No very extensive literature on this subject is to be found; for example, there is no article on the subject in Palgrave's *Dictionary of Political Economy*. The most noteworthy treatment is found in Lassalle's work *System der erworbenen Rechte*, 2 vols. (See summary in *Reden und Schriften*, Vol. III) and in Wagner's *Grundlegung*, 3d ed., I² § 306 (4) and § 307 (4). The workingmen's view of vested interests is found in Mr. and Mrs. Webb's *Industrial Democracy*, Vol. II, pp. 562–572, also pp. 514, 595.

See "Vested Rights," article by Thorold Rogers, in the *Contemporary Review*, Vol. LVII, pp. 780–796 (June, 1890). A strong statement of the wage-earner's claim to vested interest in skill, etc., as given by J. M. Ludlow, is found in "Über den Entschädigungsanspruch der durch die Maschinen verdrängten Arbeiter" by Eduard Bernstein, in *Die Neue Zeit*, Vol. I, 1897–98, pp. 789–93.

[2] P. 755. *Vested Rights* in constitutional law. Definition in Black's *Law Dictionary*.

"Rights which have so completely and definitely accrued to or settled in a person that they are not subject to be defeated or cancelled by the act of any other private person, and which it is right and equitable that the government recognize and protect, as being lawful in themselves, and settled according to the then current rules of law, and of which the individual could not be deprived arbitrarily without injustice, or of which he could not justly be deprived otherwise than by the established methods of procedure and for the public welfare."

[3] P. 756. *Cf.* Brook's *Social Unrest* for a general treatment of some aspects of the case in the chapter "Man and Society *versus* Machinery," Chap. VI.

[4] P. 757. "L'effet retroactif donné à la loi serait un crime."

[5] P. 757. "Aucune loi, ni criminelle, ni civile, ne peut avoir d'effet retroactif."

[6] P. 758. "Sowie überhaupt ein neues Gesetz auf vergangene Fälle nicht gezogen werden mag."

[7] P. 758. Art. I, Sec. IX, 3.

[8] P. 759. *Law Dictionary*, pp. 446–447.

[9] P. 759. See Sidney Webb, *Fabian Essays*, p. 43. Quoted from Clifford's *History of Private Bill Legislation*.

[10] P. 761. A resolution proposed by the Executive Committee of the Fabian Society for the Municipalization of the Drink Traffic reads as follows: "That compensation be dealt with on the basis of notice for a term of years and compassionate allowances to persons suffering hardship by being thrown out of employment." This was one of eight resolutions, and it is stated was "referred back". See *Fabian News*, May, 1898. This is especially noteworthy as coming from an organised body of English socialists.

[11] P. 761. Lecky's *Democracy and Liberty*, Vol. II, pp. 159, 163.

CHAPTER II

VARIOUS THEORIES OF VESTED INTERESTS. GROUNDS FOR A FAR-REACHING RECOGNITION OF VESTED INTERESTS

As we have already seen in the discussion of expropriation (Part I, Chap. XX) Ferdinand Lassalle advanced the theory that in all contracts and laws there is a silent clause, a something understood but not expressed, to the effect that this law or this institution is valid so long as it does not carry with it something contrary to the public conscience, but when it does offend the public conscience the law or institution becomes of no legal force.[1] It simply ceases to exist. This idea has been applied at times, as in the case of slavery in the United States. To be sure, its abolition was a war measure, but apart from that there were those who felt that slavery was something wrong and because of this belief they thought that the slave owners should not be indemnified.[2] And we went so far as to provide in the Fourteenth Amendment to the Constitution of the United States that no payment should be made or claim allowed by the United States nor any State "for the loss or emancipation of any slave." Probably this is the first time that this theory of vested rights ever found actual expression in the fundamental law of a great nation.

We see the same theory of vested interests advanced very frequently by the advocates of temperance reform in regard to the indemnification of those engaged in the liquor traffic. The views of Henry George in respect to landed property are somewhat similar, although perhaps he does not show so clearly the idea of evolution. He says that landed property is something which according to natural rights cannot exist; that all the title-deeds in the world are consequently of no force; that they are based upon a wrong. We have in this view an application of this abstract doctrine.

We have a doctrine also of vested interests in Fichte's philosophy. He says a contract or acquired right rests upon the individual wills of those who participate in it; that only one's own will binds one, and not the will of another, hence the recognition of vested interests will depend upon the wills of those participating in the institution involved.

It has been proposed by many—among others by Émile de Laveleye—to recognise the wage-earners' claim to a vested interest in their skill, and to indemnify them for any loss which they suffer by general social progress. When on account of social progress it becomes necessary to take the land of the land owner he is indemnified,—when for example, it is taken for a railway. The argument is that the wage-earner whose skill becomes of no avail because of improvements should be similarly indemnified. Not only the land owner, but, it is urged, the man who has built up a business in transporting goods and passengers, should be indemnified if he cannot find any longer an equally re-

munerative employment. The wage-earner's view is stated by Mr. and Mrs. Sidney Webb in these words, "By the doctrine of vested interest we mean the assumption that the wages and other conditions of employment hitherto enjoyed by any section of workmen ought under no circumstances to be interfered with for the worse." [3] This doctrine underlay the opposition to new machinery and new industrial processes in England up to about 1860 and it underlies similar opposition elsewhere. This doctrine more or less clearly expressed, sometimes quite clearly expressed by the workingman, is at the basis of demarcation disputes as they are called in England to-day. There are distinct lines which separate one kind of work from another. The idea is that each one has a certain territory upon which others must not encroach. This idea is also the basis of regulations requiring a long period of apprenticeship as a condition of entering a trade, etc. The engineers in England in 1845 used the analogy of a medical school and the limitations of practice, and such analogies are frequent. The following is an extract from Mr. and Mrs. Webb's *Industrial Democracy*.[4]

"By the Doctrine of Vested Interests we mean the assumption that the wages and other conditions of employment hitherto enjoyed by any section of workmen ought under no circumstances to be interfered with for the worse. It was this doctrine, as we have seen, which inspired the long struggle lasting down to about 1860, against the introduction of machinery or any innovation in processes. It is this doctrine which to-day gives the bitterness to demarcation disputes, and lies at the back of all the regulations dealing with the 'right to a trade.' It does more than anything

else to keep alive the idea of 'patrimony' and the practice of a lengthened period of apprenticeship, whilst it induces the workmen of particular trades to cling fondly to the expedient of limiting the numbers entering those trades, even after experience has proved such a limitation to be impracticable. But the Doctrine of Vested Interests extends much further than these particular Regulations. There is scarcely an industry in which it will not be found, on one occasion or another, inspiring the defence of the customary rates of wages or any threatened privilege. In some cases indeed we find the whole argument for Trade Unionism based on this one conception. The Engineers, for instance, in 1845 supported their case by a forcible analogy: 'The youth who has the good fortune and inclination for preparing himself as a useful member of society by the study of physic, and who studies that profession with success so as to obtain his diploma from the Surgeons' Hall, or the College of Surgeons, naturally expects in some measure that he is entitled to privileges to which the pretending quack can lay no claim; and if in the practice of that useful profession he finds himself injured by such a pretender, he has the power of instituting a course of law against him. Such are the benefits connected with the learned professions. But the mechanic, though he may expend nearly an equal fortune, and sacrifice an equal portion of his life, in becoming acquainted with the different branches of useful mechanism, has no law to protect his privileges. It behooves him, therefore, on all reasonable grounds, and by all possible means, to secure the advantages of a society like this to himself.' The same idea is put with no less clearness by some of the smaller trades. 'Considering,' say the Birmingham Wireworkers, 'that the trade by which we live is our property, bought by certain years of servitude, which gives to us a vested right, and that we have a sole and exclusive claim on it, as all will have hereafter who purchase it by the same means. Such being the case, it is evident it is our duty to protect, by all fair and legal

means, the property by which we live, being always equally careful not to trespass on the rights of others. To that end we have formed this Association, etc.'"

The coopers in England in 1833, as we are told by these authors, advanced a very curious doctrine of vested interests. They worked chiefly for brewers, and they actually resented the spread of education and the threatened measure of local option because this measure would diminish the use of beer and so diminish their opportunities of making kegs. They claimed a vested interest in the nation's drink habits. There has been a parallel attempt on the parts of employers to give the sanctity of property or vested interests to the right of hiring labour at low rates and of working it long hours. Employers sometimes claimed the length of the working day as a part of their vested interests. Sir James Graham as minister of the Crown denounced the Ten Hour Bill as "Jack Cade Legislation." A Lancashire employer in 1860 said the power of the trade union "robs (for I can use no milder term) the capitalist of his right to purchase." This was a sentiment of the old craft gilds and incorporated companies. Numerous quotations are given by Mr. and Mrs. Webb from whom these illustrations are taken.[5] The doctrine of vested interest in trade was, in England, undisputed until the middle of the eighteenth century. To enter into a man's field of occupation was like stealing his wares. It is now as astonishing as it is instructive to notice the old ideas and the changes which have taken place in our ethical and economic ideas in this particular. The emperor Sigismund in 1434 said: "Our forefathers have not been

fools. The crafts have been devised for this purpose, that everybody by them should earn his daily bread, and nobody shall interfere with the craft of another. By this the world gets rid of its misery and every one may find his livelihood." Three hundred years later the Parliament of Paris said: "The first rule of justice is to preserve to every one what belongs to him; this rule consists, not only in preserving the rights of property, but still more in preserving those belonging to the person which arise from the prerogative of birth and of position." This was a protest against Turgot's decrees which were directed against privileges.

Advocate-General Segnier at about the same time said, "To give to all subjects indiscriminately the right to hold a store or open a shop is to violate the property of those who form the incorporated class." Thus we see that the right of a man to his special skill would mean a right to property, to give to each one what is called his "established expectation". The workingmen have had a feeling, which has frequently found expression, that the failure to give them a vested interest in their skill, etc., is something which works against them, that it is class discrimination. They say brain workers are protected by patents, copyrights, and compensations. Property owners are protected. A spokesman of the workingmen says: "An industrious man having learnt a trade, or enabled by any honest means to earn a superior living, is equally entitled to an adequate indemnity if his trade or property is interfered with or rendered less advantageous, as the owner of a water mill who has compensation if the water is withdrawn. Every

description of property has ample protection except the poor man's only property, his and his children's industrious habits."

We might say, as does Hadley, that like emancipation following the development of property rights, this doctrine of vested interests localises poverty.[6] Compare also this from the Webbs, "To the members of a craft gild or incorporated company it seemed as outrageous and as contrary to natural justice for an unlicensed interloper to take his trade as for a thief to take his wares." [7]

At the present time, however, most though not all of the more intelligent trade unions and workingmen have given up this idea of vested interests, feeling that they cannot consistently hold to it. In the era of industrial revolution this doctrine could not give the advantages of security. This has been well shown in *Industrial Democracy*. "You have rights in a certain trade upon which nobody must encroach. But this kind of trade may disappear; in this case the only way in which you could secure indemnity would be not through a right to that trade but through payment on the part of society." It would be necessary to extend the doctrine beyond what the workingmen contemplate in order to protect them. Old advantages could be retained only by strengthening old methods. We see an illustration of this in the case of compositors and typesetters who rebelled against the typesetting machine. Their expressions of opinion suggest the doctrine of vested interests.[8]

What is it which determines a recognition of vested

interests? It is the ethical ideas of the period, the strength of the social class behind the claim, and the ease with which practical measures can be devised for the recognition of the claim. The Webbs mention these cases: private lotteries were abolished in England in 1698. The owners did not receive any indemnity. The slave trade was abolished in 1807 without any indemnity. In 1834 slavery was abolished in the West Indies and vested interests were allowed. In the case of the Irish parliamentary boroughs, which were abolished in the time of the union, vested interests were recognised. In England in 1832 vested interests were not allowed when the rotten boroughs were abolished. In the Councils and Departments of Public Works no vested interest of the contractors is recognised. Take the case of public electric lighting works in England. In the case of competition between the electric lighting works and the gas works the latter have no claim of vested interests. But no town can set up rival gas works or water works without indemnifying the owners of the private water works or gas works. In other words there is a recognition of vested interests in these cases.

Similarly in Massachusetts any town establishing a competing gas plant must first endeavour to come to terms with the owners of the private plants. In other words, the claim of vested interests is allowed. In Wisconsin an existing company has an indeterminate franchise and is protected against an invasion of its territory; but, on the other hand, it must submit to regulation of its service, including charges, by the Wisconsin Railroad Commission. No company in that State may

undertake a public utility or railway without first securing a "certificate of convenience and necessity". The tendency is in this direction in the United States.

We find a very general claim of vested interests on the part of those who think they will be injured by public competition; for instance, American express companies have claimed a vested interest in the transport of parcels and protested against the development of the parcel post. Banks also protested against the establishment of postal savings banks by government. They said that they had in the banking business an interest with which the government must not interfere. We have here a doctrine of protectionism which is carried very far, private corporations rebelling against governmental activity.

We may say in regard to the English practice that it makes a peaceful change easy. It produces a maximum of change with a minimum of pain, because if the claim of vested interests is allowed, those who are displaced do not suffer as they would otherwise and they may not suffer at all; thus they are not so ready to resist the change. This practice promotes mobility in society, whereas if changes are made without a recognition of vested interests the burden of change rests upon a few, and we have consequently great suffering and a greater dread of change and a greater opposition to change on the part of those who anticipate that they will be injured thereby. Some changes cannot easily be made on account of the view of contract held by our courts, or they can be made only with much difficulty. It seems to the author that the English practice is better,

that it is preferable to take a more flexible view of contract and a more rigid view of vested interests. We must not interpret vested interests too loosely, because if we do we have excessive claims for indemnity. We must not recognise every claim of vested interests. When a true vested interest is disturbed the compensation can come from taxation and if the system of taxation is a good one the burden will in that way be widely and justly diffused.

On the other hand, the development of the police power by American courts, already seen to be one of the greatest contributions ever made to jurisprudence, helps us at this point; for it means in this connection the distinction between those injuries which are simply to be regarded as general burdens imposed on owners of rights and those which cannot be impaired without compensation. For something like one hundred years, but more particularly during the past fifty years, the ablest judicial minds in America have been coping with this precise problem. The courts have confined their attention chiefly to property, contract and liberty, but the concept of police power can be further extended so as to become a theory of vested rights.

Notes and References to Chapter II

[1] P. 765. He sums up his central thoughts in these words:

"Jedem Vertrage von Anfang an die stillschweigende Klausel hinzuzudenken ist, es solle das in demselben für sich oder Andere stipulirte Recht nur auf so lange Zeit Geltung haben, solange die Gesetzgebung ein solches Recht überhaupt als zulässig betrachten wird." Lassalle, *System der Erworbenen Rechte*, 2nd edition, edited by Lothar Bucher, p. 164.

[2] P. 765. Emerson's idea is expressed in these lines:

> "Pay ransom to the owner?
> Aye, fill the bag to the brim.
> But who is owner?—The slave is owner,
> And ever was. Pay him!"

Mr. John Spargo commented as follows upon these lines, in response to a question concerning compensation to the slave owner at the Sagamore Sociological Conference at Sagamore Beach, Massachusetts, June 30, 1908:

"Here is the abstract ethical principle, and I do not think you can improve upon that very much. But as a practical human question, I think you could, perhaps improve upon it. Nothing is so wrong as an unintelligent application of a right principle; nothing is so unjust as inflexible justice; nothing is so monstrously unrighteous as a righteousness that cannot bend. The fact is that we are creatures of a system; we are not ourselves personally responsible for the system. I think there was a good deal of humanity and wisdom in the British method of paying a certain compensation to African slave owners. I think that it is questionable at this time whether we in this country abolished slavery in the best possible manner, whether we are not today paying the penalty for a certain unwisdom of method." (Report of the Sagamore Sociological Conference held at Sagamore Beach, Massachusetts, June 30, 1908, p. 27).

This, like the quotation from the Fabians about compensation, is noteworthy because it is likewise the utterance of a socialist.

Hadley speaks about progress-upward movement and says of emancipation from slavery that it localises poverty, but he presupposes the establishment and growth of property which he has just discussed. See Hadley, *Economics*, Chap. II, §§ 33–45.

[3] P. 767. *Industrial Democracy*, Vol. II, p. 562. This entire chapter is largely based on Mr. and Mrs. Webb's book; and without seeking to shift the responsibility for any of the conclusious reached, the author wishes to make it clear that with regard to this particular part of the subject he has followed the classic treatment of *Industrial Democracy*.

[4] P. 767. Webb, *op. cit.*, Vol. II, p. 563.

[5] P. 769. Webb, *op. cit.*, Vol. II, pp. 565–6.

[6] P. 771. Hadley, *op. cit.*, Chap. II, §§ 33–45.

[7] P. 771. Webb, *op. cit.*, Vol. II, p. 565.

[8] P. 771. The Webbs present as a modern substitute "The Doctrine of the Living Wage," *op. cit.*, Vol. II, p. 590. See pp. 582–97.

"There is a growing feeling . . . that the best interests of the community can only be attained by deliberatively securing to each section of the workers, those conditions which are necessary for the continuous and efficient fulfilment of its particular function in the social machine." (p. 590).

"For fifteen years this idea of a 'Living Wage' simmered in the minds of Trade Unionists. The labour upheaval of 1889 marked its definite adoption as a fundamental assumption of Trade Unionism, in conscious opposition both to the Doctrine of Vested Interests and to that of Supply and Demand. The Match Girls had no vested interests to appeal to and Supply and Demand, to the crowd of hungry labourers struggling at the dock gates, meant earnings absolutely inconsistent with industrial efficiency." (p. 588).

The Webbs say further, (p. 591) "The Doctrine of a Living Wage goes far in the direction of maintaining 'established expectation.' Whilst it includes no sort of guarantee that any particular individual will be employed at any particular trade, those who are successful in the competition may feel assured that, so long as they retain their situations, the conditions of an efficient and vigorous working life will be secured to them."

Then in a footnote, they add: "Thus the Doctrine of a Living Wage does not profess, any more than does the Doctrine of Vested Interests or that of Supply and Demand, to solve the problem of the

unemployed or the unemployable. All three doctrines are obviously consistent with any treatment of that problem, from leaving the unemployed and the unemployable to starvation or mendicancy, up to the most scientific Poor Law classification, or the most complete system of state or trade insurance."

CHAPTER III

VESTED RIGHTS, ECONOMIC JUSTICE, AND SOCIAL PROGRESS

It remains to add a few suggestions concerning vested rights, economic justice and social progress and to show perhaps still more clearly that they may all be harmoniously adjusted. Unfortunately there is a too widespread desire to make a socially injurious sacrifice of the one or the other. The radicals insist on social progress but often are willing to sacrifice vested rights and to urge the state to break faith with those who have trusted it. On the other hand, many conservatives shrink with horror from such a violation of economic justice as the abolition of vested rights but ignore the real grievances which the radicals desire to correct.

John Stuart Mill set a good example to both conservatives and progressives. He was a radical on the whole, and one who has never been accused of timidity of utterance. All admired his purity and uprightness. Gladstone dubbed him the "Saint of Rationalism", and speaking of Mill's parliamentary career the English statesman said, "He did us all good." Yet one of the things about which Mill was most scrupulous was his insistence that government, standing for the people, should keep faith with individuals and with economic

classes. The case of land has already been adverted to. Our American nation, acting through both federal and State government, has extended a general invitation to the people to acquire full property in land; and the invitation has been accepted by Americans, while people have come from the ends of the world to acquire property in land, in accordance with our own conditions. Prairies have been broken and forests felled; the streams have been turned on the parched deserts and the ground made to yield its returns; while hardships—and often very great hardships, frequently shortening life—have been endured in making "dead land" "living land". Now it is seriously proposed, because of an abstract doctrine of natural rights, to deprive the land owners of their land values. It is not believed by the author that the American conscience will ever accept this proposition. If a mistake has been made, it is the mistake of the nation, and not of one particular class in it.

The same general principles are applicable to franchises and to all other grants by which vested rights are acquired. We see that we have made many mistakes in granting rights thoughtlessly. No great nation has been so reckless, so prodigal as ours in giving away valuable resources and privileges—the natural fruit of a dominant individualism, coming to us from two sources: from the frontier life, which was often in advance of the establishment of law and order, and from the world-wide sweep of the eighteenth century social philosophy. When we should have granted only surface rights in the land, and reserved mineral rights for the people, we set no limits downward or upward to the

rights of the owner. Where we should have reserved rights of control over railways with respect to the carriage of mails, as most countries have done, we have failed to do so. Where we should have limited public utility franchises in point of time, we have sometimes granted perpetual franchises. We should everywhere have reserved banks and shores of streams and harbours or at least important rights with respect to them, but we have failed to do so. To the grave disadvantage of the people, important riparian and shore rights have become vested in individuals. And in our abundance we have been careless and indifferent in the selection of our legislators and of other agents who have at times knowingly and corruptly betrayed their trust, though more frequently their failure to safeguard public interests has been due to ignorance coupled with a false dominant social philosophy.

But are we Americans as a people to escape the logical outcome of our mistaken philosophy, of our carelessness and indifference? Are the thrifty and the unthrifty, the prudent, the careful and the thoughtless all to fare alike? Surely this is contrary to the moral order of the universe. Yet it has been shown that it is not necessary to perpetuate ancient wrongs, and that new and wiser policies may replace old and mistaken policies, even without injustice. Reserved rights are ample and especially in this connection must we think of the police power which has never been definitely limited but is capable of indefinite growth and expansion; also of the right of eminent domain and of taxation. All these rights have been discussed. The police power regulates

private property in the public interest; the right of eminent domain enables us to substitute public property and public rights for private property and private rights; and the right of taxation is capable of such development that it may justly spread over the community the burden and sacrifice of changes in property rights; at present it is one of the principal tasks of the statesman and of the scientific student of public finance to develop taxation with this end in view. If an individual has profited by social mistakes, then he must in due measure atone for the mistake, if rectified, in the payment of his share of taxes. Also as a taxpayer he has to pay his share of the losses due to social mistakes when the property of others is purchased in the public interest.

And as John Stuart Mill has well pointed out, the right of property includes the rights flowing from prescription. He says:

"Before proceeding to consider the things which the principle of individual property does not include, we must specify one more thing which it does include: and this is that a title, after a certain period, should be given by prescription. According to the fundamental idea of property, indeed, nothing ought to be treated as such, which has been acquired by force or fraud, or appropriated in ignorance of a prior title vested in some other person; but it is necessary to the security of rightful possessors, that they should not be molested by charges of wrongful acquisition, when by the lapse of time witnesses must have perished or been lost sight of, and the real character of the transaction can no longer be cleared up. Possession which has not been legally questioned within a moderate number of years, ought to be, as by the laws of

all nations it is, a complete title. Even when the acquisition was wrongful, the dispossession, after a generation has elapsed, of the probably *bona fide* possessors, by the revival of a claim which had been long dormant would generally be a greater injustice, and almost always a greater private and public mischief, than leaving the original wrong without atonement. It may seem hard that a claim, originally just, should be defeated by mere lapse of time; but there is a time after which (even looking at the individual case, and without regard to the general effect on the security of possessors), the balance of hardship turns the other way. With the injustices of men, as with the convulsions and disasters of nature, the longer they remain unrepaired, the greater become the obstacles to repairing them, arising from the aftergrowths which would have to be torn up or broken through. In no human transactions not even in the simplest and clearest, does it follow that a thing is fit to be done now, because it was fit to be done sixty years ago. It is scarcely needful to remark, that these reasons for not disturbing acts of injustice of old date, cannot apply to unjust systems or institutions; since a bad law or usage is not one bad act, in the remote past, but a perpetual repetition of bad acts, as long as the law or usage lasts." [1]

It is absolutely impossible to go far back in the attempt to take property from those who have acquired it even by force and fraud and to restore it to the descendants of those who have been wronged. And the law recognises necessity; this also is in the interest of society. It is only an arbitrary, abstract, and unreal concept of property which would, let us say, dispossess present owners of land in England and would seek to restore the land to descendants of those who were wronged and robbed at the time of the Norman Conquest, over eight hundred years ago, even if this were

a possibility. The concept of property which would require this is an anti-social idea, taking property in many an instance from those who manage it well and conferring it upon the imprudent, the foolish, the ignorant, upon prodigals and in some cases even upon paupers who would dissipate it. Those disinherited can and must be ministered to by general measures of social reform and uplift for which in a just system the proprietors pay somewhat in proportion to their means without any attempt to apportion nicely the various degrees of past wrong-doing.

What we have reason to complain of is an undue restriction of the right of eminent domain, which will not allow us with justice to all to correct past errors; this restriction is due to a too narrow interpretation of public purpose, an interpretation which in turn is due to an excess of individualism in the law, which we are slowly correcting. Why should we struggle so long to secure the recognition of beauty as a public concern? And how arbitrary are the distinctions between what can and what cannot be done, due to the failure to grasp the full import of the true nature of property as a social institution. German and Dutch cities regulate the height and width of buildings and make the regulations different for various sections of the city in accordance with their character and destination as residential quarters, factory districts, etc. Thereby they are made beautiful and attractive in the interest of rich and poor alike and their legislatures and courts do not intervene. Our courts call such regulations invasions of property rights, while at the same time they now and again in-

timate that hereafter courts may find æsthetic appearance within the purview of public purpose; the judges stand on the brink like shivering boys dreading to plunge into the stream, where after all the water is of the right temperature and the swimming good. On the other hand, Dutch cities, as we have seen, shrink from American methods of opening up suburbs for new residential quarters and of making property owners pay for street improvements by special assessments. They say, as a Dutch mayor wrote the author, "we in Holland have too much respect for the 'sacred rights of property.'"

These general principles enable us to decide various questions before the public. In England up to 1870 the telegraph was private property; wasteful competition had been encouraged and the existence of several companies in the course of the development of the telegraph system had increased the capitalisation. But the loss was due to a mistaken public policy, and the general public, represented by the state, paid for its mistakes in a high price (that is high as compared with the cost of reproduction) just as it should have done instead of saddling the burden on those who happened to be owners at the time. In the United States competition was encouraged by our established public policy and the Western Union Telegraph Company had to increase its outlay of capital to secure a desirable unity of the telegraph system of the country. Where does the blame rest?

Are we then helpless? By no means. Some people seem to lose all their interest in proposed reform as

soon as they see that the general public cannot acquire some one's property at less than its true value; these people rail at the courts because they simply recognise the fact that a vested interest has become established in accordance with good law.

The main question before us concerning proposed transfers in ownership of public utilities and of other property-rights from the individual to city, State, and nation, is not the price. If we wish to purchase public utility plants we must pay a fair price and we must use such rights as we have reserved with respect to purchase. But the possible loss due to past mistakes is not the chief problem. Let us suppose that we desire to buy for the post-office, the telegraph lines of the country and by a harsh policy could save $30,000,000. This amount to the American nation is not vital or particularly pertinent. This must not be taken to give approval to social indifference to waste or extravagance. Such a sum as that mentioned would be multiplied many times as a result of carelessness—even small sums must, if possible, be recovered when they have been taken wrongfully from the public treasury; and those who represent the people must be alert to make fair bargains and to practice true economy. But what is here discussed is quite a different matter. It concerns the results of past mistakes; and the contention is that the sum of thirty millions of dollars is relatively a small matter. The real problem—and the larger issue—is to get a better arrangement and coördination of the factors of production and distribution. This is also true in regard to land. We do not want to get

back values with which we have parted, but even if we accept Henry George's economic theory of landed property, the chief problem is to release from disuse certain pieces of land and bring them into use, and to bring about better adjustments generally. In other words, getting back values does not touch the question of social reform, whereas the true problem is to bring about in the future better service, better arrangements and adjustments.

The crucial case is given when privileges and property are secured by deliberate corruption and this is presented in its most drastic form in the New York case, already mentioned, the Broadway Franchise Steal, in which it was proved in court that aldermen had been corrupted and the chief offenders were sent to the penitentiary. The prevailing opinion is that, insamuch as the right was reserved by the people, through the legislature, to alter, amend, and repeal charters;[2] and inasmuch as the case was notorious and received wide attention, the franchise should have been forfeited when the legislature by virtue of its constitutional right repealed the charter of the corporation, for here the "innocent stockholders" could not figure largely. But the New York Court of Appeals, as we have seen, decided that all the property, including the franchise, should be used by the directors in the interest of stockholders and bondholders, and the difference to the property owners before and after the dissolution of the corporation was the difference between tweedle-dee and tweedle-dum.[3]

This question of property rights granted by a corrupt

legislature was decided legally in 1810 in an able opinion by Chief Justice Marshall in the case of Fletcher *v.* Peck, and the opinion is good economics as well as good law. It appears that in 1795 the legislature of Georgia sold vast tracts of land, comprising a large part of the present States of Alabama and Mississippi, to four so-called Yazoo Land Companies. The sale was made for the nominal sum of a cent and a quarter an acre. Rank corruption was charged. Most members of the legislature, it is generally believed, owned shares in these companies. An agitation was started to elect a legislature which, to undo the damage, would repeal the act of sale and would take measures to recover the land by refunding the money paid. But naturally the speculators in the meanwhile hastened to sell their land to "innocent" third parties in New England and elsewhere. The new legislature carried out the programme and the new Constitution contained a clause repealing the sale and endeavouring to undo its consequences.

Chief Justice Marshall used these words in his decision:

"If the majority of the legislature be corrupted, it may well be doubted whether it be within the province of the judiciary to control their conduct, and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated is not clearly discerned. . . . But the real party, it is said, are the people, and when their agents are unfaithful, the acts of those agents cease to be obligatory. . . . It is, however, to be recollected that the people can act only by these agents, and that, while within the powers conferred on them, their acts must be considered the acts of the people. If the agents be corrupt, others may be

chosen. . . . But the rights of third persons, who are purchasers without notice, for a valuable consideration, cannot be disregarded. Titles, which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. . . . He has paid his money for a title good at law; he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure and the intercourse between man and man would be very seriously obstructed, if this principle be overturned. . . .

"When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community." [4]

It is a most dangerous doctrine that the people are not to be responsible for the acts of their agents and are not to suffer when they make unwise choices. It is hard for one who thinks clearly in regard to the full significance of the alternative not to approve the action of our courts in holding the people responsible for acts of their corrupt and ignorant representatives. Are the people of a self-respecting community to be looked upon as children and to be permitted to take back what they have parted with, to recall all bad and foolish bargains made for them by their duly selected agents, and to let those stand which prove to be in their favour? How could that security exist which is necessary to the economic intercourse of a civilised and prosperous community?

But we should couple civil with criminal responsibility and seek to recover damages from those who procure grants and privileges by corrupt means. All grants

should be carefully scrutinised as to the fulfilment of conditions. President Cleveland set a good example and quickened the public conscience when he instituted proceedings whereby he recovered for the nation vast tracts of land from railway companies which had not fulfilled the conditions of the grants.

Reservation of rights for the future, limitations of franchises, the establishment of expert commissions of control, and in some cases public ownership suggest themselves as remedies; and where we have foolishly parted with property and rights we must repurchase them. If in a particular case a perpetual right of exemption from taxation has been granted, the remedy is payment for that right; but the amount should be scrutinised with particular care in doubtful cases. If we have parted with riparian rights when we thought them of no value, we must buy them back, if we wish to own them. And so on indefinitely. But as already stated this must not be understood to give approbation to reckless parting with public money. Not only should care be exercised not to pay more than true value but use should be made of reserved rights found in Constitutions and charters. For example, if the right of repurchase at a given price has been reserved it is hard to see why more should be paid. We cannot enter into greater details and refinements such as must arise in actual practice for here we are concerned only with general guiding principles of social action.

Finally, by another route we again reach the conclusions already implied, if not expressed, in preceding chapters, that we may preserve vested rights, that we

may do full justice to all, that we need never break faith, and that while as a nation we pursue this upright course of conduct we shall not be impeded in that rate of social progress which corresponds to our capacities.

Notes and References to Chapter III

[1] P. 782. *Principles of Political Economy*, Bk. II, Chap. II, § 2.

[2] P. 786. "Corporations may be formed under general laws. . . . All general laws and special acts passed pursuant to this section, may be altered from time to time or repealed." Constitutions of 1846 and 1894, Art. VIII, Sec. 1.

[3] P. 786. People *v.* O'Brien, 111 N. Y. 1 (1888).

[4] P. 788. Thayer's *Cases on Constitutional Law*, Vol. I, pp. 114–123; 6 Cranch. 87; 2 Curtis's Decisions, 328. See also art. by Professor C. H. Haskins, "The Yazoo Land Companies," in *American Historical Association Papers*, Vol. V, pp. 398–437, and Treat's *The National Land System, 1785–1820*, pp. 355–366.

PART IV

APPENDIX II[1]

PERSONAL CONDITIONS

Note to Appendix II

[1] P. 793. See note in reference to Appendix I.

CHAPTER I

INTRODUCTORY

In Professor Wagner's *Fundamental Principles* there is a heading called "Unfreedom and Freedom and the Structure of the Latter." The word unfreedom seems to be really necessary to express our meaning. Professor Wagner speaks about the structure of freedom or liberty, meaning that liberty is not a unity but that it is a complex idea. So we must also speak about the structure of unfreedom and its formation.

This subject of freedom and unfreedom in its economic aspects is something which has not been discussed with sufficient care. As Professor Wagner truly says, the socialists have not examined this subject as carefully as they have examined the subject of property. Nor have the economists examined it to so great an extent, and this means that they have given very little attention to it in its critical aspects.

It is generally said that in the development of liberty we pass from status to contract, but we regard this statement as inadequate. If we want to have great groups or classes of relations, we must say that we pass from status to contract, possibly again to a certain sort of status but at any rate to modified contract. Or perhaps to express it better, we pass from classes to individ-

uals, to groups. In early society we speak of classes; there we have the status or condition determined by law. Then we pass over in certain periods of development, especially in the French Revolutionary period, to individuals; then we pass on to groups of individuals, the condition which we are now very clearly reaching. We have groups of capitalists, of workingmen, and even of scientific men.

There is still opportunity to say a great deal about status, for it has not been worked out on its economic side any more than our other subjects have. We can have given very little time to it. The author once heard an adherent of the Protestant Episcopal Church speak about status and quote from the Catechism in the Book of Common Prayer what he called an illustration of status: The question is, "What is thy duty towards thy neighbour?" and the answer includes this, "To do my duty in that state of life into which it shall please God to call me"; but he misquoted it, "it hath pleased God to call me." [1] Status means the station or position into which one is born; this gives us various types of society. One of the best illustrations of status would be the caste system of India, and yet we are perhaps inclined to exaggerate what is termed status. Sometimes what appears to be caste is simply an economic classification of society. Noblemen, the king, etc., are born to positions; and the gild system to a certain extent rests upon status. Certain occupations go down from father to son, and this also is status. But one point to be insisted upon is that we have the economic classes just as much now as in the past and that

people for the most part remain in the same class into which they are born. Changes may in earlier times have been more frequent than we now think, and the changes at the present time may be less frequent than we are inclined to suppose. Many people in Germany, England, and France rise from the position of the workingman to that of the employer, but there they are the exceptions. Even now there is a relative permanence in the older countries of the world; and probably as a rule even in the United States—although here the mobility is exceptionally great—the fathers of those who work by the day were usually day-labourers, the grandfathers were in the same position, and so on indefinitely.

We have various conditions under what we call status,—slaves, serfs, etc. And we notice that one condition grows out of the other, and that on the whole there is a gradual upward movement, although at times a relapse from a higher to a lower condition is observable. The serf class becomes the servant class and it is engaged for a long period for customary wages; then these wage-earners work up to a position where they are engaged by the month, week, or even the day. We have the slave class, the serf class, the servant class, and then the wage-earners in one general ascent. During the fourteenth and fifteenth centuries the wage-earning class in England was largely recruited from the class of villeins, as Professor T. W. Page shows in his monograph on *The End of Villainage in England.*[2] Also in most modern times the more advanced nations exhibit a gradual upward movement of classes which is in part caused by the incoming of immigrants in large

numbers from less advanced nations, these newcomers performing the harder and less agreeable tasks, and lifting up the other classes; they infrequently being elevated by still newer immigrants. This has frequently been noticed in the United States, but the same trend may be observed in Germany and Switzerland although it is less pronounced in these countries. But it is a very great thing that we have in our day an ever growing flexibility and elasticity in our economic classes and it is on the whole ever increasingly easier for men and women to find their true place where they associate with their own kind. This idea of mobility is expressed with some exaggeration in the phrase common in the north of England: "It takes three generations from clogs to clogs": the American equivalent being "from shirtsleeves to shirtsleeves".

Notes and References to Chapter I

[1] P. 796. Yet perhaps, and even probably, it does give some idea of status.

[2] P. 797. *Publications* of the American Economic Association, 3d Series, Vol. I, pp. 93–96.

CHAPTER II

SLAVERY AND DISTRIBUTION [1]

This chapter takes up one of the classes which fall under the head of status. We discuss slavery primarily in its relation to distribution. For although slavery has a close relation to production as well as to distribution, it has not been treated systematically in this latter relation. Most generally it is treated with respect to the right and wrong of the institution and is discussed more generally from the standpoint of production than from that of distribution, the aim being to show how unsatisfactory is production under slavery.[2]

Slavery is established by authority; thus under slavery we have a distribution brought about by authority. The slave receives maintenance according to his standard of life—a coerced standard chiefly—and this is not altogether different from wages, if we accept the standard of life as the determinant of wages. In the case of slavery, however, any surplus value over and above the standard at once accrues to the owner of the slaves.

Yet in the case of slavery as in the case of wages we must ask, What are the counterservices of the owner of slaves? For we are giving our attention not to the right and wrong of the institution but to its connection

with distribution. When, from this point of view, we compare the productivity of the slaves in the South before the Civil War with that of the same class when left to themselves in Africa, we shall perhaps feel that they received in their maintenance the full product of their toil. They received at any rate as much as they could have produced alone and unaided. Those acquainted with the coloured people will be inclined to agree with the view, that if the white people had simply moved away and left the slaves to themselves the latter would not have produced any more than they received while they were slaves. The writer is perfectly aware that that is not the whole question but is one side only and a part of the distribution side.

But what about the standard? Slaves received, as their share of the product, maintenance according to a standard. How do the standards of life of the slave compare with the standards of life of the wage-earner? They are different in different times and different countries. On the whole probably the standard of the coloured person in the South is rather higher than the standard of the slave was before the war although the difference is not so great or so marked as to prevent dispute on the subject. Many of the slaves who lived in the families of well-to-do and kindly disposed persons were better off than many of the independent workers by the day, employed on the plantations or on little farms worked on shares, are at the present time. They had far better food, shelter, and medical treatment. At the same time, of course, under our system of slavery no slave could accumulate anything legally his own. Professor

Roscher expresses the view [3] that the slaves who in the *Odyssey* cared for the hogs, cattle, etc., were in a better condition than the peasants of Attica, "who were free, but buried in debt until the time of Solon." He says that in Athens one could scarcely distinguish between the slave and poorer freeman either by "looks or by dress".[4] But differentiation in economic well-being accompanies freedom, and the differences in the Southern States are greater than they were before the war.

We have also to consider the other conditions of toil, not only its material reward. The conditions of toil are a part of distribution. The question is, What does one get out of the economic activity of society? In answer to this question it is necessary to consider the conditions under which one toils, because these conditions are part of what makes up the enjoyment and satisfaction of life. Under slavery everywhere the slaves are subject to outbursts of cruelty but normally and regularly the treatment under slavery seems to have been mild. It was certainly so in the South and probably was in Rome, and as a rule in Greece, although we do read of exceptions. In the far South where the slaves were worked in gangs the individuals were lost sight of and the exposure and cruelty were no doubt greater. Customary distribution, as Bagehot has shown us, is mild.[5]

We have to consider also under the head of slavery its effect on the distribution of wealth among the other classes. We have been asking about this distribution only so far as the slaves were concerned but a part of the question too much overlooked is this: What

effect has slavery on the distribution of wealth among the non-slave holding classes? [6] We first observe that the surplus wealth produced over and above the rewards of labour is smaller. Thus there is less wealth to be distributed among the free people of the non-slave owning classes. This is less signficant in a primitive condition of society where we have unskilled labour and brute force, but as we advance to increasingly higher economic conditions we need an increasingly greater amount of skill. Slavery does not produce skill and thus sooner or later slavery is likely to become an economic anachronism. Thus we have under slavery, especially in advanced stages of society, always relatively less surplus for distribution. The inefficiency of slave labour is proverbial, and testimony to this effect can be quoted *ad libitum*. It is said that slavery was proving economically injurious in Virginia before the emancipation. It is stated that in the West Indies the slaves used to accomplish as much in an afternoon given them for their own purposes as they would otherwise do in an entire day.[7]

But Spahr shows us that with this diminution in resources there was concentration of wealth in a few hands. There was less wealth to be distributed but greater concentration and consequently less wealth for the ordinary free man; [8] probably the condition of the South was typical in this respect. We had the poor white people, including the so-called "white trash", and a few rich people. The natural result of slavery is that free labour is despised, and the white man who has no capital is at a disadvantage.

But under the head of slavery-distribution we must notice modifications produced in slavery by custom, sometimes by law, and finally gradations in slavery; for slavery is not always one and the same thing. Custom allowed various things at various times and places, permitting the slave to receive in some instances much beyond subsistence and in some cases even to receive a surplus from the ownership of other slaves. Special mention must be made of the *peculium*, which Roscher (p. 227) says was fully developed in the time of Plautus (254–184 B. C.). This was the property which by custom was allowed to slaves. Frequently they could dispose of this *peculium* by will; this was allowed by humane masters. Sometimes the slaves were paid salaries or given an allowance and permitted to make savings. They were to pay their masters a certain sum and anything they could earn beyond this they could have for their own use, sometimes for their own emancipation. This was customary in Brazil some fifty years ago. Slaves frequently bought themselves and in that way they had a stimulus to exertion. Slaves have even acquired wealth. Plato in his *Republic* speaks of a slave who asked the daughter of his master in marriage. As already seen *peculium* could include a slave.[9] Yet slavery was especially hard among the Romans, although it became milder finally, and in the second century under Hadrian laws were passed protecting slaves. Roscher speaks of gradations among slaves, and says that every gradation denotes amelioration (*servi ordinarii* and *mediastini*, etc.) and a step toward emancipation (p. 227).

We may go further and discuss slavery from the standpoint of culture, asking what it means for the development of a higher civilisation, also what benefits have come to the human race from slavery. The standpoint of Aristotle in the ancient time was that slavery contributed to the development of culture and was necessary. Aristotle held also that the slaves participated to a certain extent in the benefits of slavery, and that a slave attached to an owner was in a better condition than one who was not thus attached and who therefore could not partake of the nobility of a master. In the older times when prisoners of war were often put to death slavery was considered as a step in advance of this practice.

We finally consider the economic causes of slavery. The first great general cause, according to Wagner, is the economic need of lower personal services,—that is, a lower grade of labour power in material production, the need that the higher classes felt for some persons of a lower order to minister to them. The use of slavery for higher spiritual service came later. At times slavery is the result of defects in distribution which have left some in poverty and debt, leading to slavery.[10] This has been very common; indeed one great cause of slavery has been poverty and debt. Among the ancient Germans loss at play was one cause of slavery. The old laws of the Russians recognised as causes, "insolvency, marriage with a slave, illegal breach of contract for service, flight, unconditional contract for service." [11] In olden times a man's pledge of his own person was frequently the only security for loans. The need of

protection was one of the causes of serfdom and of slavery. Until quite recently, and even within the days of our fathers, poverty has led to debt and to imprisonment for debt, which may be looked upon as a sort of slavery. Even in nominal freedom poverty has led to results which resemble slavery in actual conditions; and in the Bible we read that "the borrower is servant to the lender." [12]

Notes and References to Chapter II

[1] P. 800. Among very many possible references the following are given to books that are especially pertinent in connection with this chapter: Adam Smith, *Wealth of Nations*, Bk. III, Chap. II; J. S. Mill, *Principles of Political Economy*, Bk. II, Chap. V. Professor J. E. Cairnes discusses slavery from an economic point of view in his work on *Slave Power*. Dr. John K. Ingram of Trinity College, Dublin has also discussed it in his *History of Slavery and Serfdom*. See also Roscher's *Political Economy*, Bk. I, Chap. IV. For slavery in the United States see especially the *Documentary History of American Industrial Society*, Vols. I and II, with an excellent introduction by Professor Ulrich B. Phillips.

[2] P. 800. Roscher's *Political Economy*, (English tr.) Vol. I, p. 224, note 9. Changes in actual conditions accompany *formal* changes, but are not so great always as we are inclined to suppose.

[3] P. 802. *Op. cit.*, p. 213.

[4] P. 802. *Op. cit.*, p. 226.

[5] P. 802. See his *Physics and Politics*.

[6] P. 803. Dr. Spahr's work on the *Distribution of Wealth in the United States*, helps us to answer this question, and we have also helpful suggestions in Roscher's work.

[7] P. 803. Roscher, *op. cit.*, p. 217, note 4.

[8] P. 803. With due allowance for all defects in Dr. Spahr's book he seems to have proved this point conclusively.

[9] P. 804. Roscher, *op. cit.*, p. 227, note 7. "Even from the time of Plautus the *servi honestiores* were wont to keep *vicarii*, or subordinate slaves."

[10] P. 805. Roscher, *op. cit.*, p. 209.

[11] P. 805. Roscher, *op. cit.*, p. 209, note 3. Roscher refers to Karamsin, *Russische Geschichte*, Vol. II, p. 37.

[12] P. 806. Proverbs, xxii, 7.

CHAPTER III

CASTE AND OTHER FORMS OF STATUS

Perhaps there can scarcely be a better illustration of status than caste. According to caste a man is born into a class and those who come after him inherit his class. It is ordinarily said that according to Brahmanism there are four original castes, namely:

I. Brahmans. A priestly or sacerdotal class which stands high above the other castes.

II. Kshatriyas. A caste of soldiers and rulers.

III. Vaisyas (Visyas). A class of husbandmen and merchants.

IV. Sudras. A caste of labourers and mechanics.

V. Pariahs. Men of no caste. These are far below the labourers and mechanics. Then there are besides "numerous mixed castes which have sprung up in the progress of time." [1]

However, a critical examination does not seem to present to us these four distinct classes or castes in India. The account which Sir Henry S. Maine gives of the caste system of India, in his *Village Communities*,[2] presents the castes as real economic classes, founded upon occupation. He says, "The real India contains one priestly caste, which in a certain, though very limited, sense, is the highest of all, and there are besides

some princely houses and a certain number of tribes, village communities and guilds" which claim to belong to class II or III, but their claim is doubtful. He says that it seems to be the opinion that the theory of caste was probably never true except of the two highest castes; but that this Brahmanical idea of caste has exercised an influence on Hindoo society. Tradition has great weight. "But otherwise caste is merely a name for a trade or occupation, and the sole tangible effect of the Brahmanical theory is that it creates a religious sanction for what is really a primitive and natural distribution of classes." So caste is after all simply an expression for an economic class and this class system has a certain religious sanction so that men cannot pass from one caste to another. India is divided into a large number of social groups—trading, manufacturing, and cultivating groups. Every tribe, gild, clan, every trade and profession tends to become a caste. A new sect in India becomes a new caste.

Now the caste system is something rather outside of the evolution of our Western world and it ought to prove instructive, for it shows us the further development of something which already exists among us.

Under European conditions we pass from slavery to serfdom and like forms of dependence although there is no regular forward movement but only a general tendency. Sometimes there is a going backward, as from a full free to a half free condition; the villeins in many regions, like the Roman *coloni*, were, for example, the descendants of a relatively free class. Serfdom is a somewhat higher step than slavery although more or

less similar to slavery. The main causes of serfdom were conquest and the need of protection, and debt especially as the result of a pledge of the person as credit for loan, the need of organisation of economic forces which at certain times could more easily be brought about in this way than otherwise, also sometimes mere residence in a village or community of serfs, finally the economic evolution of society, making serfdom a step upward from slavery.

It is not necessary to dwell at length on these various causes. In all early ages conquest worked a forfeiture of property and of personal rights and only gradually did the losses resulting from conquest diminish. The loss of freedom as the result of this has prevailed to a greater or less extent during nearly the entire history of the world.

And in some way or another economic forces must be organised as a condition of production; and slavery and serfdom were means used at various periods in economic history.

Finally, it was not unnatural that one living and working in a community of serfs should come to acquire their legal status. There is an old German expression to the effect that "die Luft macht unfrei," [3]—"The air makes unfree"; just as there was another expression, "Stadtluft macht frei,"—"The city air makes free." The serf removing to the city often became free.

We have steps in serfdom. There are two great classes: first, those who were attached to the person of the lord and could be sold away from their homes, and second, those attached to the soil. Those attached to

the soil were called *glebae adscripti* and attachment to the soil was called *glebae adscriptio*. The latter condition, that of serfs attached to the soil and not to be sold away from it, was a higher condition and often gradually led to freedom. In Webster's *International Dictionary* it is said that, strictly, serfs are those attached to the soil only and that those who can be sold away from it are slaves. At a certain stage it was probably difficult to distinguish between the serf and the slave.

In the case of the serf attached to the soil, a forward step was taken when his labour was defined and regulated. He was obliged to render to the lord a given amount of labour and commodities, and this was often commuted into money payments. Sometimes this was even preferred by feudal lords in need of money. Then in a period of rising prices it became easy to make these money payments, and the discovery of gold and the precious metals in America in the sixteenth and seventeenth centuries in this way helped to free the serfs, because of the higher prices which resulted therefrom. Gradually the whole relation of serfdom was abolished, frequently with the assistance of the state and with or without remuneration to the feudal lords. And after the fall in the value of money it was especially easy to settle the claims which had found a monetary expression. Early in the nineteenth century in the interests of economic production of wealth it was evidently desirable to do away with the feudal relations. So sometimes, as in Germany, the state made loans to those under feudal obligations, enabling them to discharge

these obligations and get rid of these relations. In the long run the lower classes had the better in the struggle; the steady pressure from below was successful.

As in the emancipation of slaves, the economic reasons for the changes were perhaps the chief, although not the only, grounds. The influence of the Church cannot be overlooked although possibly it is exaggerated. On the whole, however, it was a power making for freedom. The economic forces found expression in the cities with their manufactures. The need of workmen was so great that the principle was established that if a serf stayed a year and one day in a city he was free from his feudal dependence. But sometimes economic causes produced a backward movement. For example, take the case of the slaves in our own South. A strong party for emancipation existed in Virginia before the production of cotton farther south became extremely profitable, but then the chains of the slaves were riveted more firmly. And as it was the cotton gin of Eli Whitney which was one of the prime causes of the profitableness of cotton, we witness a remarkable effect of a technical invention which enslaved rather than freed men.

In regard to the share of the serfs in production, there was gradually, as we pass to the higher stages of serfdom, a change in distribution from assigned subsistence to earned subsistence. Slavery means assigned subsistence, and when we reach the higher degrees of serfdom we have an earned subsistence. Serfdom carries with it the obligation to make payments to the lords. Many of the serfs gradually became land owners, and

then they added the rents and profits to their personal earnings. Heriots (*mortuaria*) [4] were common as early as the tenth century and this shows that the bondmen had acquired property.

Next we pass to the domestic servant system.[5] We do not now think of this as a system of status but originally it was such. We have slavery, serfdom, and a domestic servant system, the latter growing up out of serfdom. This includes more than household servants. Servants in industry and the children of servants were held to service in the household of the lord for very low wages or none at all. Long periods of service showed the connection between serfdom and the domestic service system. In Adam Smith's time and so late as the latter part of the eighteenth century the presumption was that service was for one year. In the time of Frederick the Great the ordinance of 1769 forbade contracts for domestic service for a shorter period than one year and even now in Germany the general period seems very long to the American who goes there.[6] Until recently it has generally been required to give three months' notice on either side to terminate a contract for domestic service. In Germany the servants receive a large percentage of their pay in the form of Christmas presents. It is sometimes stipulated that the wages shall be so much per year and so much for Christmas presents and this will sometimes amount to one-third of the year's wages. This points back to the origin of the domestic servant system in serfdom. It is also still true that they must have a book in which they must write their name and each employer must sign his name

giving a certificate of good behaviour, which shows the condition of dependence pointing back to the older condition out of which the domestic servant system grew. Probably even the habit of addressing servants by their Christian names may be a survival of serfdom and, through it, of slavery.

But gradually the bonds of the domestic servants became weaker and we can already see this in Germany. In most households in the United States they have the cohesive strength of a rope of sand! There are various economic causes for the weakening of the bond between the servant and the master. Roscher mentions as causes in Germany the sales of public domains, producing small estates and independent households; also military duty. These causes tended to break up old conditions. Thus in one way or another we have reached the modern wage system. Perhaps certain disabilities under which the wage-earner suffers can be traced to survivals. In older countries it was until within a comparatively recent time necessary for the wage-earner to carry about a book just as the domestic servant carries about a book, in which the employer enters his name and can make remarks in regard to the character of the servant. This has been required, until recently at any rate, in France.

But a final word of caution must be uttered. It is not to be supposed that an evolution such as we have discussed in barest outlines is altogether desirable. An explanation of economic history does not mean its justification. The breaking of old ties of dependence and protection is carrying with it many evils. The re-

lationship of master and servants was frequently and happily sometimes still is one of mutual dependence and of mutual service. A false idea of independence on the part of a young girl in domestic service often makes it impossible for her older, wiser and more experienced mistress to afford her the protection and help she sadly needs; and thus many are ruined on account of the weakening of old ties. Into a discussion of the way out of the evil situation we cannot here enter.[7] [8]

[1] P. 808. Webster's *International Dictionary.*

[2] P. 808. pp. 56–7, 219.

[3] P. 810. Wagner, *Grundlegung*, 3d ed., I^2, (i. e. P. II) 55.

[4] P. 813. "A customary tribute of goods and chattels, payable to the lord of the fee on the decease of the owner of the land." Bouvier, *Law Dictionary.*

[5] P. 813. Discussed by Roscher in section 76 which is an appendix to Chap. IV; and Chap. IV deals with "Freedom and Slavery."

[6] P. 813. But German conditions approximate year by year the American.

[7] P. 815. On the modern aspects of the domestic service problem see especially *Domestic Service* by Professor Lucy M. Salmon. An instructive description of American conditions as seen by a German woman with incidental comparison with German conditions is found in the brochure: *Das Dienstbotenproblem in den Nord Amerikanischen Staaten und was es uns Lehrt* by Dr. Else Conrad (Jena, 1908). The popular literature on the subject is vast, but the scientific treatment of it is meagre.

[8] P. 815. For an excellent description of the English rural, as distinguished from urban, development see the masterly work, *English Farming, Past and Present*, by R. E. Prothero.

CHAPTER IV

PERSONAL CONDITIONS AS GOVERNED BY CONTRACT. FREEDOM AND ITS STRUCTURE. THE SOCIAL THEORY OF LIBERTY AND THE POLICE POWER

We pass over from old bonds to what we call freedom. The use of the expression "freedom and its structure" shows that we have not simply a unit but a variety of units. Now what naturally comes under this head has been discussed to some considerable extent in other connections, and a few points only will be touched upon in this chapter. Personal rights have already been discussed in a different connection. These come, however, under the head of freedom and its structure because they give meaning to modern freedom. The ground is in part covered by what has been said under the head of rights akin to property. Also what has been said in regard to contract covers this part very largely, because contract gives meaning to personal freedom, and what is to be said under the head of competition and custom defines and describes freedom. Also there are certain rights of economic significance which would come under this head, such as the right of marriage and of settling where one pleases, the right of emigration and of immigration, the right of migration. All these refer to personal rights.

Then under this head we could consider further, if we desired, the various ideas of freedom. We have considered these to some extent, in a positive sense and a negative sense. We refer again to the old abstract idea of freedom based upon the conception of the individual as existing isolated and alone, which is based upon a false economic and social philosophy for the individual does not stand alone and isolated but has grown up and come to his present condition through society. Freedom is not an abstract idea and something quite apart from society but is itself a social product acquired in and through society.

Personal conditions have been covered very largely by contract for free men in all times. But the class of free men has varied and with contract we have had certain restrictions. First of all it is natural to take up the old restrictions which coexist with contract. We have laws of settlement of one kind or another which were a restriction upon those nominally free. Among these laws of settlement we have already mentioned one to the effect that a man could not move into a parish unless he could give a guarantee that he would not become a charge upon the parish. Then we have the earlier laws of marriage, which restricted marriage to those able to give evidence that they had a fixed and firm position and could support a family. There are still in many places restrictions for those occupying certain positions. In Germany to-day a man in the army cannot marry unless he can give assurance that he will be able to support a family in accordance with the received ideas of

his economic position (*standesgemäss*). A man in Germany belonging to the civil service cannot well marry unless he has means to support a family. We have also had restrictions coexisting with contract and restricting it by gilds and corporations of artisans and workingmen. These were swept away by the French Revolution, the ideal of which, as already stated, was to bring man directly into contact with man. Laws were passed against combinations both of employers and of employees. Even when we see the greatest freedom of movement and the fewest restrictions, there are still always certain classes without entire freedom of movement, such as women and children.

So we have, first, contract with the old restrictions; second, the era of individual contract; and then in the third place, we have new restrictions. We have private corporations springing up, giving us combinations of capital which restrict the freedom of labour. Then we have combinations of labour and we have the group contract or the collective bargain to which attention has already been directed. We have also coexisting with contract and limiting it, legislation for the workingmen, for women and children, differing in a marked manner from the old restrictive laws passed in the interests of employers. These new laws are in the interest of the workingmen.[1]

We have also restrictions upon freedom of contract, springing up through the temperance laws. Also restrictions of movement as seen in the tramp laws which are quite like the restrictions upon freedom of settlement in the last century in England. The motives

which have led to the tramp laws are similar to those which led to the laws restricting free domicile, namely, to limit pauperism and to prevent a pauper belonging to one parish or political unit from becoming a charge upon another. Another purpose of anti-tramp laws is to provide safety to women and children, the need of which is seen especially in crimes of tramps. Still another reason for far more stringent enforcement of anti-tramp laws is to save boys from this evil life which so often is alluring to them.

We have restrictions of freedom of movement seen in the laws concerning immigration, emigration, and migration. For example, have not American and Australasian anti-Chinese laws proceeded from the standpoint of distribution, as the prime moving force? although a partial explanation is found in other political and social considerations; for example, the difficulty of amalgamation, aggravating the other race problems which already vex us.

Compulsory arbitration likewise limits and restricts freedom of contracts most sharply. But all these restrictions on the freedom of contract which govern personal conditions have as an aim betterment. The end for which we are striving is an enlargement of the individual by surrounding him with those personal conditions which will make possible an actual constructive freedom; and this signifies again a sphere for the development of all faculties in a society of men bound together by ties of mutual dependence and mutual service. The pressure of mutual dependence is like the pressure of the atmosphere, which is not felt because

of the uniform balance of forces. Remove this balance and the pressure is crushing. Remove mutuality and dependence may degenerate into bondage. Therefore the prime problem of modern economic freedom is the maintenance of mutuality in relationships.

Freedom, liberty, is a social product. It is found in proper adjustments of social relations. It exists for the sake of society, which is here dominant as elsewhere, but it is only in a free society based on right social relations, regulated according to principles of mutuality, that the individual finds a sphere for growth and attains liberty in the positive constructive sense. Through the police power the courts construe liberty. The written Constitutions of the United States put in their charge this precious treasure; and the courts will for the first time be equal to their task, when they work away from doctrinaire abstractions which grew out of primitive economic conditions and attain to the social theory of liberty.

Note to Chapter IV

[1] P. 819. "These laws, though in the interest of working men, are sustained by courts because they are in the interest of society. In spite of our rampant individualism group consciousness prevails." S. P. O.

APPENDIX III

PRODUCTION, PRESENT AND FUTURE

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APPENDIX III

PRODUCTION, PRESENT AND FUTURE

Recent economists have been much given to discussing distribution as if production were merely a necessary prerequisite with which the economist deals only in a casual way. Some writers have openly declared production to be so abundant as to make proper distribution the only problem really awaiting solution. Few have, however, undertaken any statistical study of the amount or value of the product available for distribution. The following pages are devoted to some estimates of the total and average incomes in different countries and especially to present and probable future income in the United States.

Income may be statistically studied from two different points of view: first, the net money income; and second, the real income measured in dollars or, in other words, the dollars' worth of consumers' goods used up. These two quantities should differ by the total value of net savings, that is net increase in the value of the stocks of economic goods on hand.

The estimates of the incomes of Prussia and England and the first estimate of the income of the United States are calculated on the net money income basis. The second estimate of the income of the United States

is computed by estimating the value of goods and services consumed per annum.

Statistics of Prussian Incomes for 1908

Estimated on the Basis of the Total Money Income of the Inhabitants

Total number of persons paying income tax	5,880,000
Total value of income taxed[1]	12,795,100,000 m.
Average number of persons per taxpayer	3.077
Total number of persons in taxed families	18,090,000
Estimated population in 1908 [2]	38,880,000
Total population not taxed	20,790,000
Estimated number of males not taxed	10,027,000
Estimated number of females not taxed [3]	10,763,000
Percentage of males occupied in industry	61.05
Percentage of females occupied in industry [4]	26.40+
Number of male non-taxpayers occupied	6,121,000
Number of female non-taxpayers occupied	2,839,000
Maximum possible income for male non-taxpayers, lower limit of income tax, exemption added	3,000 m.
Probable minimum wage for male non-taxpayers	400 m.
Probable average income for male non-taxpayers	1,100 m.
Women estimated at	400 m.
Total wage non-taxpaying men	6,733,100,000 m.
Total wage non-taxpaying women	1,135,600,000 m.
Total taxed income	12,795,100,000 m.
Total income	20,663,800,000 m.
Estimated total population	38,880,000
Per capita income = $126. =	531 m.
Income of family of 4.66 = $589. =	2,476 m.

British Income Statistics
1906–7

Estimated Net Money Income of the Inhabitants of the United Kingdom

Gross income assessed to tax [5]	£ 943,703,000
Incomes covered by rebates for revenue tax [6]	39,336,200
Abatements—Incomes £160–700 (est.) [7]	211,500,000
Total income of those assessed	1,194,539,200

E Total number of persons assessed (est.) [8]	1,750,000
Number persons in assessed families (est.)	4.5+
Total persons in assessed families	7,876,000
Total pop., United Kingdom (est.)	43,320,000
Total pop., United Kingdom not assessed	35,444,000
J Total females employed (est.) [9]	5,570,000
K Total males employed (est.) [10]	13,600,000
L Total non-assessed males employed (K–E)	11,850,000
M Total male children employed (est.) [11]	1,700,000
N Total female children employed (est.) [12]	1,700,000
Total men employed (non-assessed) (L–M)	10,150,000
Total women employed (non-assessed) (J–N)	3,870,000
Weighted average weekly wage for men [13]	28.2*s.*
Employment per year in weeks (est.)	46.
Weighted average wage for men per annum	1,297. *s.*
(Weighted average wage for men = average wage in textile industry, therefore wage in textile industry for women also assumed typical)	
Average wage for women per week	15.5*s.*
Yearly wage for women, 46 weeks [14]	714. *s.*
Average wage for boys per week (textile basis)	10.5*s.*
Average wage for boys per year 40 weeks [15]	420. *s.*
Average wage for girls per week (textile basis) [16]	9.0*s.*
Average wage of girls per year (40 weeks) [17]	360. *s.*
Total wage of non-assessed men	658,200,000
Total wage of non-assessed women	138,200,000
Total wage of non-assessed boys	35,700,000
Total wage of non-assessed girls	30,600,000
Total assessed income	1,194,500,000
	£2,057,200,000
Total population of the United Kingdom	43,320,000
Average income per capita	£47.5
Income per family of 4.5+ = $1,046 =	£215
Sir Robt. Giffen estimated the income of the United Kingdom in 1903 at [18]	£1,750,000,000
Population in 1903	42,200,000
Income per capita	£41.47
Income per family of 4.5+ = $1912 =	£187.4
W. T. Layton in *An Introduction to the Study of Prices*, p. 5, estimates the annual income of the United Kingdom for 1911 at	£2,000,000,000

Robt. H. Smith in Q. J. Econ., Vol. XXV, estimates the total taxable income as £1,577,000,000 with less than £100,000,000 untaxed.

ESTIMATED NET MONEY INCOME OF THE INHABITANTS OF THE UNITED STATES FOR 1910 *

Summary of Wages and Salaries in the United States 1910

Industry or Occupation	*Number Employed*	*Annual Income*	*Total Wages or Income*
Manufacturing (wages)	7,276,551	$ 518	$3,769,974,167
Manufacturing (salaries)	869,294	1,187	1,032,432,464
Laundry workers	450,000	500	225,000,000
Miners	680,000	700	476,000,000
Railroad employees	1,699,420	673	1,143,725,306
Street R. R. employees	83,000	720	59,760,000
Telephone operators	70,000	550	38,500,000
Teamsters	640,000	750	480,000,000
Common labourers	3,300,000	500	1,650,000,000
Servants and waiters	1,850,000	450	832,500,000
Policemen	155,000	750	116,200,000
Soldiers	60,000	400	24,000,000
Clerks	1,400,000	550	770,000,000
Bookkeepers	300,000	720	216,000,000
Small entrepreneurs	1,400,000	1,500	2,100,000,000
Large entrepreneurs	300,000	6,000	1,800,000,000
School teachers (Academies)	12,075	700	8,452,500
School teachers (Public Schools)	523,210	485	253,915,170
College teachers (Male)	24,514	1,200	29,416,800
College teachers (Female)	7,410	750	5,558,000
Clergymen	135,000	1,000	135,000,000
Physicians and dentists	185,000	1,800	333,000,000
Lawyers	140,000	1,800	252,000,000
Government officials	102,000	2,000	204,000,000
Miscellaneous professions	231,000	1,600	360,600,000
Miscellaneous	2,141,526	750	1,606,145,000
Total personal returns	24,035,000		$17,922,179,407

* The estimates in this table are nearly all based on figures given in the Statistical Abstract of the United States for 1911.

SUMMARY OF NET MONEY INCOME OF THE UNITED STATES 1910

Total personal returns	$17,922,179,407
Farm products not fed on farms less expenditures for machinery and fertilisers	6,740,000,000
Increase in value of farm lands	1,541,700,000
Net income of corporations	3,360,251,000
Income from $60,000,000,000 of other productive wealth at 6%	3,600,000,000
Total Income	$33,164,130,407
Population of the U. S. 92,174,515	
Net money income per capita	$ 359.80
Net money income per family of 4.6	1,655.00

The difference between this estimate and that based on consumption is practically $1,800,000,000 and a large share of this amount doubtless represents the annual savings from the money income of the inhabitants.

REAL INCOME IN THE UNITED STATES FOR 1909 *

Estimated Total Value of Goods and Services Consumed by the Inhabitants in that Year

Value of consumers' goods manufactured	$10,882,784,000
Value of consumers' goods imported	581,834,000
Manufactures plus imports	$11,464,618,000
Value of consumers' goods exported	492,083,000
Manufactures plus imports minus exports	$10,972,535,000
Percentage added for transferring to consumer	80%
A. Value of manufactured goods to the consumer	19,751,000,000
Consumers' goods produced on farms	2,962,000,000
Percentage for getting agricultural produce to the consumer	100%
B. Value of agricultural products to the consumer	5,924,000,000
Fish	54,000,000
Percentage for getting fish to the consumer	200%
C. Value of fish to the consumer	162,000,000
Value of coal at the mines	1,000,000,000
Percentage for getting coal to the consumer	100%

* The estimates in this table are nearly all based on figures given in the Statistical Abstract of the United States for 1911.

D. Value of coal to the consumer	$2,000,000,000
E. Pleasure trips on railroads	290,000,000
F. Churches, schools and theatres	1,430,000,000
G. Laundry work	385,000,000
H. Personal services	985,000,000
I. Charities and support of criminals	100,000,000
J. Telephone service	150,000,000
K. Electric lights	50,000,000
L. Water	50,000,000
A plus B plus C plus D plus E plus F plus G plus H plus I plus J plus K plus L equals	31,277,000,000
Population of the U. S. in 1910 92,174,516	
Real Income per capita	$ 339.31
Real income per family of 4.6	1,560.90

Estimates practically all based on figures given in the Statistical Abstract of the United States for 1911.

The preceding estimates indicate that if the money income of the people of each nation were distributed equally to each family in that nation the results would be to give each Prussian family about 2500 marks or $600, each British family £190 or $900 and each American family about $1,600. These statistics must, however, in no way be taken to assume that such a distribution could be continuously possible. Were no extra reward given for exceptional exertion or genius, we may feel assured that the production would decrease amazingly. It seems probable, therefore, that under the most uniform distribution of income which would be possible without decreasing materially the productivity of the country, the least skilled working family could not hope to draw over $1,200 as a maximum average. Since an income varying from $750 in our smaller towns to $1,000 in New York City, is needed to provide the minimum amount of commodities requisite for a de-

cent standard of living, the common workingman can scarcely hope to revel in luxury unless the production can, in some way, be greatly increased.

But one of the claims of the socialists is that, while our present production may be inadequate to supply in any very lavish fashion the wants of society, nevertheless, the effort expended is sufficient, if properly directed, to produce an abundant income for each family and that, even with a five or six hour working day, everyone could live in comparative luxury. In a recent pamphlet, Mr. A. M. Simons, a prominent socialist, contends that each family should easily earn $10,000 per annum. He then proceeds to show the many different ways in which a saving would be effected by a socialist régime. The principal fallacies in his argument lie in the fact that he ignores several of the fundamental laws of production. He forgets the law of diminishing returns and apparently assumes that our wheat yields might be trebled at but a trifling increase of labour. He passes lightly over the question of cost of engines and their up-keep when he lauds large scale farming and he fails to mention the fact that gasoline prices are almost sure to rise rapidly in the future. In his enthusiasm concerning the savings under a socialist régime he denounces the inefficiency of our present entrepreneurs, but forgets that socialism may fail to find leaders who are paragons of efficiency since governments thus far have often signally failed in that line. He pictures the waste through poor roads but forgets the tremendous capital outlay necessary for an adequate system of highways.

While there seems to be little doubt that it is perfectly feasible to secure a more nearly equal distribution of wealth and income than at present exists, it is also equally clear that a marvellous increase in efficiency would be necessary before we could hope to see the poorer members of the community in possession of even half the average income of $10,000 per year which Mr. Simons predicts so confidently would result after a brief régime of socialism.

But, granting, for the sake of argument, that such an income is really attainable for the ordinary workingman, we must understand clearly that it would by no means follow that his manner of living could correspond to that of the business or professional man of to-day who receives a like income. Inventions and discoveries during the last century have revolutionised industry and have vastly increased the productiveness of human effort and hence the wage or income of the labourer. In some cases, his toil has been greatly lessened, but industry as yet seems centuries from the time when one needs only to push a button in order to see the finished product appear on the counter before one's eyes. True, we drop a nickel in the slot and receive a package of shoe strings, but we do not yet drop a gold piece in the slot and find a ton of coal automatically mined and delivered in our cellar. In the present state of advancement of human knowledge, there are many disagreeable tasks which must be done and no system of society or government will obviate this unfortunate state of affairs. Coal must be mined; engines must be cleaned; sewers must be kept open; ani-

mals must be slaughtered, meat prepared, fertiliser manufactured, and hides tanned; ditches must be dug; work must be performed in the biting cold, the scorching sun, the driving sleet and rain. The wealthy man of to-day avoids all these unpleasant tasks, but someone must do them.

But the Utopian proposes to invent ways of doing all these things which will make them pleasant. Very well! The purpose is most laudable, but inventions cannot be secured at will by social reorganisation or legislative enactment.

It has been seriously proposed so to shorten the hours of undesirable work as to recompense the labourer for the unpleasantness undergone. The reformer, however, should bear in mind that to shorten the hours of labour will almost proportionally lessen the product and, as a result, the hoped-for gain in income will vanish. The chances are, then, that, for many generations, the less efficient members of society must necessarily be condemned to a considerable amount of dirty and disagreeable drudgery.

But unpleasantness of labour is not the only quality which must be considered. The great engines of the machine shop, the steam shovels of the iron mines, the falling trees in the lumber camp, the hammers in the powder factory are all sources of danger. No matter how rigid the safety regulations, how effective the protective devices, human ingenuity has not yet been able to eliminate the risks to life and limb. The miner, the machinist, the lumberman and the powder maker necessarily stand more chance of accident than the business

or professional man and no system of pensions can do more than alleviate the sufferings and heartaches due to injury and death. Yet the risks are the price of civilisation and someone must take them if our existing income is not to be reduced to a mere fraction of its present size.

The citizen of to-day receiving an income of five to ten thousand dollars is usually possessed of a considerable degree of freedom of action, a considerable range for the exercise of his individuality. In contradistinction, the socialist is fond of referring to the modern workingman as a "wage-slave". If under socialism the workingman received five thousand a year he would still be a "wage-slave". His "boss" would then be a government-appointed foreman or superintendent, but, with the efficiency methods required to enlarge so enormously his income, the work would necessarily be largely automatic and at high speed. The variety of work, the independence characteristic of the present recipient of a large income, would be strikingly absent.

One of the conveniences enjoyed by the well-to-do family of to-day is a considerable amount of personal service. Under socialism, this would necessarily be cut down greatly. With such large incomes, few would care to be cooks or housemaids, coachmen, hostlers or chauffeurs. The result would seem to be that a communal system of housekeeping with alternate days in the kitchen or else each woman and her daughters doing their own housework would be the only feasible alternatives. Neither of these ideas would give the amount of luxury possible to-day on an income of five

to ten thousand dollars for this luxury consists largely of personal services.

The well-to-do man in the smaller cities usually has a comfortable residence with spacious grounds. If every family were to be accorded this convenience the necessary result would be the expansion of the city over a much larger area. The larger area would mean larger transportation charges and less efficiency in production. This, in turn, would reduce incomes.

There are many rare products consumed by the wealthier classes to-day which could not be produced in abundance for all except at greatly increased cost. It would probably be impossible for every family to have maple syrup for breakfast even at fifty dollars a gallon. The rubber industry, at present, is one of rapidly increasing costs; hence, if every family demanded a touring-car, the tire expense would be very high. The law of diminishing returns is, in many lines, an inexorable fact of nature.

As a result, we must conclude that, even if the common workingman could be guaranteed an income of five to ten thousand a year, he would still have to earn this income, in most cases, by strenuous, disagreeable, monotonous and often dangerous work and that, in the expenditure of this income, he would be limited in many ways by new customs, ideals, and expenses and would be confined to a life of considerably greater simplicity and less luxury than that enjoyed by the man with a like income under the present status of society.

It is safe to say that any estimates which can be made concerning the possibilities of saving through

the aid of socialist organisation must be crude, but it is at least possible to attack the problem from a logical standpoint. Great care must be used in avoiding duplication.

The two primary factors of production are land and labour. Changes in the amount of production must then be due primarily to changes in those two factors. Socialism can scarcely hope to increase greatly the available supply of land. Some areas now lying idle would doubtless be used, but a probable increase in the area of parks and other public grounds would largely offset any increase in the supply of movable commodities produced by means of new land brought into use. The reclamation of cut-over, arid, and swamp lands is limited by the capital of society and the accumulation of capital might be either accelerated or retarded under socialism, according to the policy of the party in power.

For advantages to be gained, then, we must look primarily to economies in the use of the labour power of the country. Labour power may be economised in two ways: first, by dispensing entirely with certain needless work now done; second, by rendering each workman more efficient. Efficiency is largely a resultant of human character. Socialism could not rapidly change this. Education might be extended, but extensions in education mean reduction in present production of commodities in the hope of a greater increase in the future. This surplus increase may or may not materialise. The socialists emphasise the vastly improved machinery with which the labourer of the future will work. But improved machinery

means more saving and saving is refraining from consumption, but at the same time socialists propose to increase consumption vastly. The two ideas are likely to prove incompatible.

It would seem, then, that for real gains of moment we must look primarily to the elimination of useless tasks, the demand for which is due to the competitive system. For this purpose, an analysis of the Census of Occupations for 1900 may prove helpful. From this report, we find that of the 29,073,233 persons engaged in gainful occupations, the following numbers were unemployed during the year and for the given periods.

1 to 3 months	3,190,124
4 to 6 months	2,562,399
7 to 12 months	740,904
Total not wholly employed	6,493,427

Of this total number of unemployed, 1,752,187 were under fifteen years of age and it may be presumed that a large part of these were attending school during part of the year. If we omit the entire group unemployed from 7 to 12 months as representing these children, we shall still have over 5,700,000 unemployed, for an average of almost 3 months each or perhaps 1,350,000 for the entire year who produce little or nothing.

Let us now take into consideration those labourers now employed at work which is only necessary because of the competitive régime.

In the class of agricultural pursuits, are placed

farmers and farm labourers, dairymen, gardeners, ranchmen, lumbermen, etc. Under a socialistic state, there would, even in this line, undoubtedly be some saving in production since farms would be arranged of such a size as to admit of the use of modern machinery, as far as possible, and since the production of the various crops would be assigned to those localities best fitted for the purpose. It would probably be safe to estimate the saving in agricultural labour at fully 10 per cent.

The next class enumerated in the Census of 1900 consists of those engaged in professional services. Of these, probably half of the lawyers and physicians and a considerable number of clergymen, dentists and other professional men could be dispensed with and still leave an ample number to render as full services to society as they do to-day. This would constitute a saving of about 20 per cent.

Probably a greater amount of duplication and unproductive labour might be found among the class rendering domestic and personal service. Scarcely anyone would doubt the feasibility of dispensing with a large percentage of the hotel, restaurant, and saloon keepers without causing a shortage in any of those lines. With a more equal distribution of wealth, domestic servants would likewise be considerably less numerous. Since poverty is a leading cause of crime, the police forces might be diminished and still afford ample protection to life and property. A large percentage of the labourers who perform odd jobs might be employed in a manner to secure a much higher product. Considering all of these facts, 30 per cent. would appear to

be a moderate estimate of the possible saving in this class.

But it is in the field of trade and transportation that probably the greatest waste of energy is caused by competition. Under socialism, the callings of agents and brokers would almost disappear. When we consider the armies of half-employed clerks in our retail stores and offices, we feel that these might be greatly reduced in number. The place of commercial travellers would be taken by a comparatively small number of government agents in no case duplicating each others' work. The line of draymen surrounding our squares and the horde of hackmen besieging the passengers from the incoming trains in the hope of picking up an occasional fare could certainly be greatly diminished by proper organisation. Hucksters and peddlers would no longer need to seek a precarious living upon our streets. Half the livery-barns could easily supply the present demand, especially if the "ubiquitous drummer" were no longer present. The petty shopkeepers would no more need to eke out an existence by catering to the fleeting fancies of the passing public. Our railways might reduce their forces, by at least a limited extent, if relieved from the necessity of competing with parallel lines and maintaining separate shops and stations in the same city. Likewise, some saving in the departments of telephones and telegraphs might be effected. With the decrease of private business, stenographers, bookkeepers, etc. would also be a less numerous body of our working population. It would seem that, on the average, a saving of 30 per cent. of the labour

in the field of trade and transportation would be a conservative estimate.

In the last group, that of manufacturing and mechanical pursuits, the first thought would be that, with our present highly developed and concentrated industrial system, socialism could promise little improvement in production. Reflection, however, will convince us that a large part of the important group engaged in the building trades are kept busy replacing the cheaply and hastily constructed structures which are purely a product of a capitalistic competitive organisation of society. Many small factories and workshops still survive whose product might be duplicated in a well equipped establishment at a lesser cost. Since, however, these are apparently a disappearing factor in our present system, they may be ignored. Even in the great factories, there are still many minor processes and uses of by-products which could be more cheaply handled if united under one management. Men engaged in preparing advertising matter could usually be better employed.

In the whole group, perhaps a saving of 10 per cent. might be accomplished.

Summing up this rough estimate of the saving in labour which an organised socialistic state might hope to achieve we get the following results.

Occupation [19]	*No. employed in given occupation*	*Per cent. of labour wasted by competition*	*No. of persons uselessly employed*
Agriculture	10,381,765	10%	1,038,000
Prof. Service	1,258,538	20%	252,000
Personal and Dom. Service	5,580,657	30%	1,674,000
Trade and transportation	4,766,964	30%	1,430,000
Mfg. and Mech. Pursuits	7,085,000	10%	708,000
		Total	5,102,000
		Unemployed	1,351,000
		Total saving	6,453,000 *

* Reeve, Sidney A., *Cost of Competition*, p. 251, by a different estimate arrives at a conclusion of 11.8 per cent. or about 3,420,000 "devoted to competition".

This, then, would mean that something over one-fifth of the labour of the country to-day is lost through lack of proper organisation of our industry. This is by no means equivalent to asserting that the socialist state would make this entire amount available. On the contrary, the almost universal assumption that common school education would be a fundamental of socialism would mean that most of those persons under fifteen years of age, and perhaps under a much higher age limit, would be placed in school and hence removed from the productive field during the major portion of the year.

Out of the 1,752,187 [20] persons under fifteen now employed we have already made an allowance of 740,000 in the ranks of those unemployed during six to nine months of the year. There would still be approxi-

mately 1,000,000 more to be subtracted from the group of 6,453,000 productive labourers gained under socialism.[21] This would reduce the number to about 5,453,000.

The question of women in the industrial field would also call for consideration. We find that, in 1900, 5,329,292 women were engaged in gainful occupations.[22] Of this number, 775,924 were married women [23] most of whom would doubtless, under socialism, be excluded from the wage-earning population. On the other hand, there would necessarily be an accession of workers from among the daughters of the present leisure classes. As to whether this would equal the number of married women retired is a question which could not be definitely settled except by experiment.

We find again, by the Census of 1900,[24] that approximately 2,000,000 of the productively engaged persons in the United States are over sixty years of age. Since one of the fundamentals of socialism is that the older members of the community shall be allowed to enjoy the fruits of their labours in peace, this group would naturally have to be deducted from the 5,453,000 previously calculated, leaving to socialism a net gain of only 3,453,000 or something less than 12 per cent. of all those employed.[25]

If, then, we concede that efficiency of production would be as great under socialism as under competition, we still must reach the conclusion that, as far as labour is concerned, we might only hope to reduce the hours of labour by ten or fifteen per cent. and still be able to receive as great a product as at present.

We have discussed the possible saving which might be attained by better organisation of the productive mechanism of the nation, but all questions as to rapidity of improvement in this mechanism are necessarily hypothetical. Any social gains by improvements in production are too often offset by opposing forces. Invention and education may quadruple the productive ability of man, but at the same time immigration may have placed such a strain upon the natural resources and have so crowded down the margin of production that the per capita output of satisfactions for the consumer is even less than under the former crude system of industry.

It is, then, perhaps of more practical moment to study the present trend of real income in order to discern the probable economic conditions of a generation hence. The following table illustrates the trend of real wages from 1890 to 1907 as computed from the figures compiled by the United States Bureau of Labor for index prices of labour and commodities.

WEIGHTED AVERAGE INDICES OF WAGES AND PRICES OF COMMODITIES IN THE BUDGET OF THE WORKING FAMILY OF THE UNITED STATES

Year	*Indices of Prices* *	*Indices of Annual Earnings* †	*Indices of Real Wages*
1890	105.7	101.5	96.0
1892	103.7	102.2	98.5
1894	98.4	96.2	97.7
1896	95.4	98.5	103.3
1898	96.6	101.0	104.6
1902	111.6	111.2	99.7
1904	112.4	118.2	105.2
1906	117.7	126.3	107.3
1907	123.0	129.0	104.9
1909	126.9	128.5	101.3
1910	131.2	131.0	99.9

* Weighted index using retail indices of food and indices of wholesale prices for clothing, fuel and light and furniture.

† Estimated from weekly earnings of employees in manufacturing industry, monthly wages of farm labourers, and annual earnings of railway employees.

The figures in the preceding table indicate that real wages reached a maximum in 1906 and have since that date been steadily diminishing, owing doubtless to the great flow of immigration from Europe and the constantly increasing pressure of population upon our limited supply of natural resources. The practical exhaustion of the supply of fertile free lands seems to be having its natural effect in forcing down the intensive margin and diminishing the return to labour.

The table below is compiled from the figures given in the United States Statistical Abstract for 1911 and is based mostly upon census figures. It shows that, despite more intensive methods in farming, the research work of our agricultural colleges and depart-

ments, and the training of farmers in agricultural schools, the yield per acre has increased but slightly since 1870. This is partially due to the exhaustion of the fertility of the soil but more so to the bringing into cultivation of poorer and poorer lands along the margin.

YIELD PER ACRE OF PRINCIPAL CROPS IN THE UNITED STATES

Year	*Corn*	*Wheat*	*Oats*	*Rye*	*Barley*
1870	26.1	11.9	28.1	13.6	22.9
1880	25.5	12.3	27.6	13.3	22.4
1890	20.7	11.1	19.8	12.0	21.4
1900	25.3	12.3	29.6	15.1	20.4
1910	27.7	13.9	31.6	16.0	22.5

Year	*Cotton*	*Tobacco*	*Hay*	*Potatoes*
1879	.398	795	1.29	98.9
1888	.364	757	1.21	80.1
1899	.392	788	1.35	88.6
1908				85.7
1909	.336	804	1.42	106.8 *

* Abnormally large.

The succeeding table, compiled principally from figures in the reports of the United States Census, shows that improvements, while failing to increase materially the yield per acre, have nevertheless enabled the individual farmer to obtain a far greater return for his efforts. We find that the value of the product per farmer has far more than doubled since 1880 while general prices of manufactured commodities have increased not more than 20 per cent. Therefore, the farmer, or rather the farm owner, has gained decidedly at the expense of the rest of the community. The fig-

ures in the last column show that the amount of the product per farmer has practically doubled since 1870 making clear that the decided increase in the efficiency per man is due to new machinery and methods of farming. This explains the increasing prosperity of the farm owner.

VALUE AND AMOUNT OF PRODUCT OF FARMER AND FAMILY IN THE UNITED STATES

Date	*Number of Farmers*	*Total Value of Farm Produce*	*Value Produced by Each Farmer*	*Index of Prices of Farm Produce* *	*Index of Amount Produced by Each Farmer*
1870	2,659,985	1,958,031,000	$ 737	161.6 [26]	456
1880	4,008,907	2,212,541,000	552	109.6	504
1890	4,564,641	2,460,107,000	539	110.0	489
1900	5,737,372	4,717,070,000	824	109.5	752
1910	6,361,502	8,694,000,000	1,364	164.6	830

* Base 1890–1899.

The following table, compiled from United States Census Reports, shows that improved methods have enabled the farmer, by cultivating the older lands more intensively and spreading out over the less fertile acres, to increase the cotton and grain supply almost as rapidly as the growth of population, but this increase has sacrificed the grazing lands and, as a result, we find a marked diminution in the per capita production of wool and animals for meat. This has resulted in greatly increased prices for the latter article and has largely caused the hue and cry concerning the cost of living. The present trend would indicate that meat prices

would soar higher until meat was gradually forced from the workingman's bill of fare.

PROGRESS OF UNITED STATES IN RECENT YEARS

A. Production Per Capita.

1. Farm Crops.

Date	*Wool in lbs.*	*Wheat in bu.*	*Corn in bu.*	*Cotton in bales*
1870	4.201	6.118	28.37	.1044
1880	4.635	9.940	34.24	.1267
1890	4.385	6.343	23.67	.1361
1900	3.798	6.872	27.70	.1351
1910	3.486	6.890	31.31	.1302

2. Number of Livestock on Farms per Capita.

Date	*Cattle*	*Hogs*	*Sheep*
1870	.6177	.6518	.7385
1880	.7910	.9924	.8412
1890	.9158	.9123	.6493
1900	.6896	.8272	.5244
1910	.5757	.6203	.4226

The next table shows that, in producing our meat by present methods, the lack of pasture necessitates a great consumption of grain. As a result, while our grain supply per capita has remained nearly constant and our meat supply per capita has greatly decreased, nevertheless our exports of grain have diminished rapidly in the last decade. The increasing population, and therefore enlarged demand, has all but annihilated our export trade in meat, butter, and cheese.

EXPORTS—AGRICULTURAL PRODUCTS

	Corn, bu.	*Wheat, bu.*	*Cotton, bales*
1867–70	9,736,905	30,646,984	2,000,000
1871–80	55,078,160	86,275,673	2,900,000
1881–90	58,459,900	126,615,708	4,300,000
1900	213,123,412	186,096,762	6,860,917
1910	38,128,498	46,679,876	6,263,293

EXPORTS—AGRICULTURAL PRODUCTS

	Canned Beef, lbs.	*Fresh Beef, lbs.*	*Bacon, lbs.*
1900	55,553,745	329,078,609	512,153,729
1910	14,804,596	75,729,666	152,163,107

	Hams, lbs.	*Butter, lbs.*	*Cheese, lbs.*
1900	196,414,412	18,266,371	48,419,353
1910	146,885,385	3,140,545	2,846,709

The agricultural lands form but one of the varied natural resources upon which our prosperity depends. Minerals are also of great importance. Our phosphate beds are being rapidly depleted and are of limited extent, yet these are essential if we keep our wheat production proportional to population.

The following figures, taken from the United States Statistical Abstract for 1911, show a tremendous increase in the rate of coal mining. Fortunately, the increased cost of mining may limit the production, else a few generations would see this priceless heritage destroyed.

Our best iron ore is likewise rapidly nearing exhaustion, but the poorer ores will probably act as substitutes for centuries after the good ores are gone.

Natural gas seems to be already on the verge of exhaustion and we may look for a rapid decline in the petroleum production in the next few years. This will tend to play havoc with many of the marginal uses of the oil and will greatly increase the cost of running gasoline engines.

The rapid deforestation of the United States and the

consequent destruction of game are too well known to require much comment.

Mineral Resources of United States

COAL.[27]

Supply in Ground.

3,135,708,000,000 short tons.

Rate of Mining.

1870	29,496,000 long tons.
1880	63,822,000 " "
1890	140,867,000 " "
1900	240,789,000 " "
1910	447,854,000 " "

The supply at the present rate of increase of mining would last probably 150 years. It is impossible, however, to continue the present rate of increase; therefore the supply may actually last 2000 years longer.

IRON ORE.[28]

Supply in Ground.

Good ore	4,788,150,000 long tons.
Low-grade ore	75,116,000,000 " "

Rate of Mining.

Year.	
1870	3,032,000 long tons.
1880	7,120,000 " "
1890	16,036,000 " "
1900	27,553,000 " "
1910	56,890,000 " "

Good ore will probably be exhausted in the next half century.

Poor ore will probably last for a thousand years.

PETROLEUM.[29]

Supply in Ground.

Estimated at 3,000,000,000,000 gals.

Rate of Pumping.

1870	220,951,000 gals.
1880	1,104,017,000 "
1890	1,924,590,000 "
1900	2,672,062,000 "
1910	8,801,354,000 "

At the present rate of increase the supply would be exhausted in 115 years. The rate will necessarily slow down so that oil may last for 200 years. The price will soon rise greatly.

Wells in Pennsylvania in 1861 averaged 207 bbls. per day each—in 1907 they produced only 2 bbls. per day.

NATURAL GAS.[30]

Likely to be practically exhausted in the next quarter century.

All of the preceding figures indicate the limited character of the national income and the marked danger of decreasing the per capita income in the future through an increase in the population and the forcing down of the margins of production. Unless the rapid increase of population can be checked, a decided fall in our prosperity and a drop in our standards of living seem imminent. The comparatively low incomes of populous Prussia and Great Britain should serve as a warning. All plans for ideal distribution must take this fact into consideration or they are doomed in advance to ignominious failure in so far as they hope to improve the well-being of the average citizen.

Notes and References to Appendix III

[1] P. 826. Zeitschrift des Königlich Preussischen Statistischen Landesamts, p. xl.

[2] P. 826. Webb, *Dictionary of Statistics*, p. 480.

[3] P. 826. *Op. cit.*, p. 480.

[4] P. 826. *Op. cit.*, p. 440.

[5] P. 826. *Op. cit.*, p. 309.

[6] P. 826. *Op. cit.*, p. 311.

[7] P. 826. *Op. cit.*, p. 311.

[8] P. 827. *Op. cit.*, pp. 309–311.

[9] P. 827. *Op. cit.*, p. 430.

[10] P. 827. *Op. cit.*, p. 430.

[11] P. 827. *Op. cit.*, p. 435.

[12] P. 827. *Op. cit.*, p. 435.

[13] P. 827. *Op. cit.*, p. 620.

[14] P. 827. *Op. cit.*, p. 620.

[15] P. 827. *Op. cit.*, p. 620.

[16] P. 827. *Op. cit.*, p. 620.

[17] P. 827. *Op. cit.*, p. 620.

[18] P. 827. *Op. cit.*, p. 629.

[19] P. 841. U. S. Census Report, 1900, *Occupations.*

[20] P. 841. *Op. cit.*, p. 76.

[21] P. 842. *Op. cit.*, p. 30.

[22] P. 842. *Op. cit.*, p. 7.

[23] P. 842. *Op. cit.*, p. 52.

[24] P. 842. *Op. cit.*, p. 17.

[25] P. 842. Compare with Sidney Reeve, *Cost of Competition*, p. 251.

[26] P. 846. Computed from figures for fourteen commodities in *Statistical Abstract* for 1911.

[27] P. 849. *Statistical Abstract* of United States.

[28] P. 849. Van Hise, *The Conservation of Natural Resources in the United States*, p. 65.

[29] P. 849. *Op. cit.*, p. 25.

[30] P. 850. *Op. cit.*, p. 56

Income of United States

Chas. B. Spahr in *The Present Distribution of Wealth in the U. S.*, pages 104–5, estimated the total national income of the United States in 1890 as follows:

Total money income for 1890	$10,800,000,000
Population in 1890 (Continental U. S.)	62,620,000
Average per capita income	$172.45
Income for family of 4.6	793
Sir Robt. Giffen in the *Journal of the Royal Statistical Society*, Vol. LXVI, page 585, estimated the income of the U. S. in 1900 at	14,600,000,000
Population in 1900 (Continental U. S.)	76,303,387
Per capita income	$191.33
Income for a family of 4.6 =	880.05
W. I. King estimates the total real income of the U. S. in 1910 at	$31,300,000,000
Population in 1910 (Continental)	92,174,515
Average per capita income	$339.31
Income per family of 4.6	1,560.90

APPENDIX IV

NOTES AND TABLES OF CASES

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LIST OF CASES ILLUSTRATING THE ATTITUDE OF THE COURTS TOWARD PROPERTY AND CONTRACT RIGHTS AND THE CONSEQUENT EVOLUTION OF THESE RIGHTS.

APPENDIX IV

NOTES AND TABLES OF CASES

This list is not intended as a list of leading cases, or ruling cases on the subjects named, but is intended to illustrate the attitude of our courts toward those subjects that are discussed in this volume. While many ruling and leading cases are to be found in the list, there are also many other cases of minor importance, but which are illustrative of the principles involved.

It is hoped that the list may be helpful to those readers who desire to familiarise themselves with the legal aspects and difficulties involved in the problems set forth in this volume.

The cases are classified and sub-heads added for the convenience of the reader. Dates of decisions are given in parentheses, so that their evolutionary trend may be apparent.

I. *Cases Illustrating the All-inclusiveness of the Term Property. What is Property?*

The right of control or dominion over things. It includes the right to improve, use, hold, enjoy, and dispose of a thing.

Morrison *v.* Semple, 6 Binn. (Pa.) 94 (1813); Jackson *v.* Housel, 17 Johns (N. Y.) 281 (1820); Smith *v.* U. S., 1 Peters

326 (1828); Soulard *v.* U. S., 4 Peters 511 (1830); McCarthy *v.* Guild, 53 Mass. 291 (1847); Jones *v.* Van Zandt, 4 McLean (U. S.) 603 (1849); Wyneheimer *v.* People, 13 N. Y. 378 (1856); *Ex parte* Law, 15 Fed. Cases, No. 8,126 (1866); Bruch *v.* Carter, 32 N. J. L. 561 (1867); Dow *v.* Gould, etc. Mining Co., 31 Cal. 637 (1867); Slaughter House Cases, 16 Wall. 36 (1872); Ayers *v.* Lawrence, 59 N. Y. 192 (1874); Thompson *v.* Androscoggin R. I. Co., 54 N. H. 545 (1874); Metropolitan C. Ry. Co. *v.* Chicago etc. Ry. Co., 87 Ill. 317 (1877); Watkins *v.* Wyatt, 9 Baxter (Tenn.) 250, 40 Am. Rep. 90 (1877); The Sinking Fund Cases, 99 U. S. 700 (1878); State *v.* New Orleans, 32 La. An. 709 (1880); Rigney *v.* Chicago, 102 Ill. 64 (1881); Jenkins *v.* International Bank, 106 U. S. 571 (1882); Griffith *v.* Charlotte etc. R. Co., 23 S. C. 38 (1884); Ft. Worth Ry. *v.* Jennings, 76 Texas 373 (1890); Estes Park Toll Road *v.* Edwards, 3 Colo. App. 74, 32 Pac. 549 (1893); McClure *v.* Cook, 39 W. Va. 579, 20 S. E. 612 (1894); Smith *v.* Furbish, 68 N. H. 123, 44 At. 398 (1894); Chicago etc. Ry. Co. *v.* Cicero, 154 Ill. 656, 39 N. E. 574 (1895); Ill. Cent. R. Co. *v.* Mattoon, 161 Ill. 247 (1896); Fears *v.* State, 102 Ga. 274, 29 S. E. 463 (1897), Hamilton *v.* Rathbone, 175 U. S. 421 (1899); Arapahoe Co. *v.* Rocky M. N. Ptg. Co., 15 Colo. App. 189 (1900); Scranton *v.* Wheeler, 179 U. S. 141 (1900); State *v.* Associated Press, 159 Mo. 410 (1901); Peabody *v.* U. S., 43 Ct. C. 5 (1907); Spring Valley W. Co. *v.* City and County of San Francisco, 165 Fed. 667 (1908); Allerton *v.* N. Y. L. & W. Ry. Co., 199 N. Y. 489, 93 N. E. 270 (1910); Fulton L. H. & P. Co. *v.* State, 123 N. Y. S. 1117, (1910); Bates *v.* Robinson, 8 Ia. 318 (1859); Russell *v.* Ralph, 53 Wis. 328, 10 N. W. 518 (1881); Waters *v.* Wolf, 162 Pa. St. 153, 29 Atl. 646 (1894).

Property does not include the right to use one's property for maliciously injuring another's property.

Barger *v.* Barringer, 151 N. C. 433; 66 S. E. 439 (1909).

But it includes the right to protect one's property by all lawful means.

People *v.* Jones, 241 Ill. 482; 89 N. E. 752 (1909).

And where private property, by consent of owner, is invested with a public interest or privilege, the owners cannot any longer deal with it as merely private property, but must have regard for the rights of the public.

State *v.* Cadwallader, 87 N. E. (Ind.) 644 (1909).

The "rights" of property, methods of acquisition, etc., are regulated by, and are always subject to, laws.

Calder *v.* Bull, 3 Dall. 386 (1798).

The limits of a man's right over his property are the rights of others.

Sexton *v.* Wheaton, 8 Wheat. 229 (1823); McCutcheon *v.* Marshall, 8 Peters 220 (1834).

The term Property includes every valuable right or interest.

Boston etc. Ry. Co. *v.* Salem Ry. Co., 2 Gray (Mass.) 1 (1854); Stanton *v.* Lewis, 26 Conn. 444 (1857); Smith *v.* McCullough, 104 U. S. 27 (1881); Williston Seminary *v.* Hampshire Co., 147 Mass. 427 (1888); Wilson *v.* Beckwith, 140 Mo. 359, 41 S. W. 985 (1897); Scranton *v.* Wheeler, 179 U. S. 141 (1900); St. Louis *v.* Hill, 116 Mo. 527, 22 S. W. 861 (1893); Low *v.* Rees P. Co., 41 Neb. 127, 59 N. W. 362 (1894); Smith *v.* Furbish, 68 N. H. 123, 44 Atl. 398 (1894).

It includes easements and franchises.

West River Bridge Co. *v.* Dix, 6 Howard, 507 (1848); Wilmington Railroad *v.* Reid, 13 Wall. 264 (1871); Metro.

City Ry. Co. *v.* Chicago W. D. R. Co., 87 Ill. 317 (1877); Long Island Water S. Co. *v.* Brooklyn, 166 U. S. 685 (1897); Adams *v.* Bullock & Co., 47 So. (Miss.) 527 (1908); Consolidated Gas Co. *v.* N. Y., 157 Fed. Rep. 849 (1907); City of N. Y. *v.* Cons. Gas Co., 212 U. S. 19 (1909).

It embraces everything to which right of ownership can be attached.

Stanton *v.* Lewis, 26 Conn. 444 (1857); Barker *v.* State, 109 Ind. 58 (1886); Carlton *v.* Carlton, 72 Me. 116, 39 Am. Rep. 307 (1881); Wilson *v.* Ward Lumber Co., 67 Fed. 674. (1895); Fears *v.* State, 102 Ga. 274, 29 S. E. 463 (1897); N. W. Mut. Life I. Co. *v.* Lewis etc., 28 Mont. 484, 72 Pac. 982 (1903).

No matter how insignificant.

Conn. Mut. Life I. Co. *v.* Stimson, 62 Ill. App. 319 (1896). In this case court held one-vigintillionth part of the front end of a lot in Chicago as property, even though it is so minute as to be unappreciable by the physical senses.

Corporeal or incorporeal.

King *v.* Gotz, 70 Cal. 236; 11 Pac. 656 (1886).

Tangible or intangible.

Stahl *v.* Webster, 11 Ill. 511 (1850); National Tel. U. Co. *v.* Western U. Tel. Co., 119 Fed. 294 (1903).

Visible or invisible.

N. W. Mut. Life Ins. Co. *v.* Lewis *et al.*, 28 Mont. 484; 72 Pac. 982 (1903).

Real or personal.

White *v.* Keller, 68 Fed. 796 (1895).

Property includes everything that has exchange value.

Slaughter House Cases, 16 Wall. 36 (1872); Dixon *v.* People, 63 Ill. App. 590 (1895); Harbison *v.* Knoxville Iron Co., 103 Tenn. 421; 53 S. W. 955 (1899).

Including labour and the right to labour.

In re Parrott, 1 Fed. 481 (1880); *In re* Marshall, 102 Fed. 323 (1900); Jones *v.* Leslie, 61 Wash. 107; 112 Pac. 81 (1910). But see Gleason *v.* Thaw, 185 Fed. 345 (1911).

It includes every right or title to realty.

Soulard *v.* U. S., 4 Peters 511 (1830); Delassus *v.* U. S., 9 Peters 117 (1835); Knight *v.* U. S. Land A., 142 U. S. 161 (1891).

Mortgages.

Stebbins *v.* Stebbins, 86 Mich. 481 (1891); Wilson *v.* Ward Lumber Co., 67 Fed. 674 (1895).

Perfect or imperfect titles.

Thompson *v.* Doaksum, 68 Cal. 597 (1886).

Mining claims.

Forbes *v.* Garcey, 94 U. S. 762 (1876); Black *v.* Elkhorn Min. Co., 163 U. S. 445 (1896).

Liens and options on real property.

Old Colony Ry. Co. *v.* Plymouth Co., 14 Gray (Mass.) 161 (1859); Haskins *v.* Ryan, 75 N. J. Eq. 330 (1908).

It includes money, goods, chattels.

Brown *v.* Brown, 41 N. Y. 513 (1869); James *v.* Barray, 128 S. W. (Kent.) 1070 (1910); Bromberg *v.* McArdle, 55 So. 805 (1911).

Fire insurance application.

Mutual Fire Ins. Co. *v.* Deale, 18 Md. 26; 79 Am. Dec. 674 (1861).

Choses in action.

Jenkins *v.* International Bank, 106 U. S. 571 (1882); State *v.* Black, 75 Wis. 493 (1890); Cincinnati *v.* Hafer, 49 Ohio St. 60 (1892).

Solvent credits.

Doty *v.* Johnson, 6 Fed. 481 (1881); Bragg *v.* Gaynor, 85 Wis. 463 (1893); Krebelkamp *v.* Fogg, 52 Ill. App. 563 (1894).

Insurance policy.

Bassett *v.* Parsons, 140 Mass. 169 (1885); Ionia Co. Sav. Bank *v.* McLean, 84 Mich. 629 (1891).

Seat in stock exchange.

Sparhawk *v.* Yerkes, 142 U. S. 1 (1891); Page *v.* Edmund, 187 U. S. 596 (1902).

Shares of stock.

Richmond *v.* Daniel, 55 Va. 393 (1858); Puget Sd. Nat. Bank *v.* Mather, 60 Minn. 362 (1895).

It includes products of the mind.

Henry *v.* Cherry & Webb, 30 R. I. 13; 73 Atl. 97 (1909).

Patents.

Commeyer *v.* Newton, 94 U. S. 225 (1876); U. S. *v.* Palmer, 128 U. S. 262 (1888).

But a mere idea unprotected by contract or law, is not property. Hawkins *v.* Ryan, 73 Atl. 1118 (1909).

Property also includes a man's business, calling or profession. Slaughter House Cases, 16 Wall. 36 (1872).

There are some things in which no right to property is recognised by the law, such as:

Dead bodies.

Guthrie *v.* Weaver, 1 Mo. App. 136 (1876).

And "free goods."

As light, air, water. Mitchell *v.* Warner, 5 Conn. 497 (1825); Syracuse *v.* Stacey, 169 N. Y. 231 (1901).

The State has the power to determine what shall be property. Even property in human beings was recognised, during slavery times.

McCullom *v.* Smith, 19 Tenn. 342 (1838); Harper *v.* Stanbrough, 2 La. An. 377 (1847).

II. *Cases Illustrating the Interpretation of the Clause of the Constitution, "No State shall pass any Law impairing the Obligation of Contract."*

Congress has general power over conditions of contract and existing laws and constitutions are a part of contracts.

Ogden *v.* Saunders, 12 Wheat. 213 (1827); Dodge *v.* Woolsey, 18 How. 331 (1855); O. & M. Ry. Co. *v.* McClure, 10 Wall. 511 (1870); Parker *v.* Davis, 12 Wall. 461 (1870); Nat. Bank W. Ark. *v.* Sebastian Co., Fed. Cases No. 10,040 (1879); Johnson *v.* U. S., 17 Ct. Claims, 157 (1881); Westerly Waterworks *v.* Town of Westerly, 75 Fed. 181 (1896); Western Nat. Bank *v.* Reckless, 96 Fed. 70 (1899); Los Angeles *v.* L. A. Water Co., 177 U. S. 558 (1900).

This general rule is modified by "police power",

Blake *v.* Winona & St. P. Ry., 19 Minn. 418 (1872); Boston Beer Co. *v.* Mass., 97 U. S. 25 (1877); N. W. Fertilizing Co. *v.* Hyde Park, 97 U. S. 659 (1877); C. B. & I. R. R. *v.* Neb., 170 U. S. 57 (1898); Manigault *v.* Springs, 199 U. S. 473 (1905).

And by the power of eminent domain.

West River Bridge Co. *v.* Dix., 6 How. 507 (1848); Eldridge *v.* Trezevant, 160 U. S. 452 (1896); C. B. & Q. R. R. *v.* Chicago, 166 U. S. 226 (1898); Long Island Water S. Co. *v.* Brooklyn, 166 U. S. 685 (1897).

And by the power of taxation.

Murray *v.* Charleston, 96 U. S. 432 (1877); Hartman *v.* Greenhow, 102 U. S. 672 (1884); Henderson Bridge Co. *v.* City of H., 173 U. S. 592 (1899); Rochester R. Co. *v.* City of R., 205 U. S. 236 (1906).

These limitations embrace contracts of States and municipalities.

Fletcher *v.* Peck, 6 Cranch 87 (1810); Town of East Hartford *v.* Hartford Bridge Co., 10 Howard 511 (1850); McGee *v.* Mathis, 4 Wall. 143 (1866); Hall *v.* Wisconsin, 103 U. S. 5 (1880); Hagar *v.* Reclamation Dist., 111 U. S. 701 (1884); Sioux City St. Ry. Co. *v.* Sioux City, 138 U. S. 98 (1891). Citizens' St. R. Co. *v.* City Ry. Co., 56 Fed. 746 (1893). Dobbins *v.* City of Los Angeles, 195 U. S. 223 (1904).

Public franchises and charters.

Fletcher *v.* Peck, 6 Cranch 87 (1810); Dartmouth College *v.* Woodward, 4 Wheat. 518 (1819); *In re* Binghamton Bridge, 3 Wall. 51 (1865); N. O. Gas Light Co. *v.* La. Light & H. Co., 115 U. S. 650 (1885); Pearsall *v.* Gt. No. Ry., 161 U. S. 646 (1895); Cincinnati H. & D. R. R. Co. *v.* McKeen, 64 Fed. 36 (1894).

The general rule is that the State reserves power to amend the charter.

Pennsylvania College Cases, 13 Wall. 190 (1871); Lothrop *v.* Stedman, Fed. Cases No. 8519 (1875); City of Covington *v.* Kent, 173 U. S. 231 (1899).

And to grant other charters, unless an "exclusive" franchise is granted.

Charles River Bridge *v.* Warren Bridge, 11 Peters 420 (1837). (See dissenting opinion of Mr. Justice Story.) Richmond F. & P. R. R. Co. *v.* Louisiana R. R. Co., 13 Howard 71 (1851); Bridge Proprietors *v.* Hoboken, 1 Wall. 116 (1863); Turnpike Co. *v.* State, 3 Wall. 210 (1865); City Ry. Co. *v.* Citizens' W. Ry. Co., 166 U. S. 557 (1897); Capital C. L. & F. Co. *v.* Tallahassee, 186 U. S. 401 (1902).

Power is reserved to the state to *regulate* the corporations operating under a public charter, but not to repeal or annul the charter.

Camden & A. R. R. Co. *v.* Briggs, 22 N. J. L. 623 (1850); Blake *v.* Winona & St. P. R. R., 19 Minn., 418 (1872); Atty. Gen. *v.* C. & N. W. R. R., 35 Wis. 425 (1874); C. B. & Q. R. R. *v.* Ia., 94 U. S. 155 (1876); Ruggles *v.* People, 91 Ill. 256 (1878); Canada So. Ry. *v.* Int. Bridge Co., 8 Fed. 190 (1881); Georgia Ry. & B. Co. *v.* Smith, 70 Ga. 694 (1883); *Ex parte* Koehler, 23 Fed. 529 (1885); State *v.* Farmer's L. &. T. Co., 116 U. S. 307 (1886); Tampa Water Works *v.* City of Tampa, 199 U. S. 241 (1905).

This regulation may be by legislation, but it must not destroy any of the property rights of the chartered corporation.

Terrett *v.* Taylor, 9 Cranch 43 (1815); Green *v.* Biddle, 8 Wheat. 1 (1823); Susquehanna R. R. Co. *v.* Nesbit, 10 Howard 395 (1850); State *v.* So. Pac. R. R., 24 Texas, 80 (1859); People *v.* Jackson & M. P. R. R., 9 Mich. 285 (1861); "Granger Cases," 94 U. S. 113 (1876). (See dissenting opin-

ion of Mr Justice Field.) New Jersey *v.* Yard, 95 U. S. 104 (1877); Ruggles *v.* Ill., 108 U. S. 526 (1883); R. R. Commission Cases, 116 U. S. 307 (1886); Cleveland Gas L. & C. Co. *v.* City of Cleveland, 71 Fed. 610 (1896).

Nor in case of regulation by "police power" can the state take away any property rights.

Zabriskie *v.* Hackensack & N. Y. R. R., 18 N. J. Eq. 178 (1867); People *v.* Ketchum, 72 Ill. 212 (1874); Pearsall *v.* Gt. No. R. R., 73 Fed. 933 (1895).

It must not restrict the corporate purposes.

Nor add new substantial burdens to the corporation.

Washington Bridge Co. *v.* State, 16 Conn. 53 (1846); Commonwealth *v.* New Bedford Bridge, 68 Mass. 339 (1854); Holyoke Water Power Co. *v.* Lyman, 15 Wall. 500 (1872).

This inviolability of public charters extends even to exemption from taxation, where that is reserved in the charter.

New Jersey *v.* Wilson, 7 Cranch, 164 (1812); Home of the Friendless *v.* Rouse, 8 Wall. 430 (1869); Wilmington Ry. *v.* Reid, 13 Wall. 264 (1871); Tomlinson *v.* Jessup, 15 Wall. 454 (1872); Mobile & O. R. R. *v.* Tenn., 153 U. S. 486 (1894); Northwestern University *v.* Ill., 99 U. S. 309 (1899).

III. *Cases Illustrating the Construction Placed by the Courts on the Constitutional Provision that "No Citizen shall be deprived of Life, Liberty, or Property without Due Process of Law."*

What is due process of law? It is the "law of the land", the customs and usages.

Van Horne *v.* Dorrance, 2 Dall. 304 (1795); Murray *v.*

Hoboken Land & Imp. Co., 18 Howard 272 (1855); Davidson *v.* New Orleans, 96 U. S. 97 (1877); Clark *v.* Mitchell, 99 Mo. 627 (1879); Schlitz *v.* Roenitz, 86 Wis. 31, 56 N. W. 194 (1893); Holden *v.* Hardy, 169 U. S. 366 (1898); Turpin *v.* Lemon, 187 U. S. 51 (1902); Lord *v.* Equitable Life Ins. Co., 94 N. Y. S. 65; 109 App. Div. 252 (1905).

It usually means a court proceeding—a "day in court".

Van Horne *v.* Dorrance, 2 Dall. 304 (1795); Davidson *v.* New Orleans, 96 U. S. 97 (1877); Backus *v.* Ft. St. Union Depot Co., 169 U. S. 557 (1898); Carson *v.* Brockton Sewage Co., 182 U. S. 398 (1900); Reetz *v.* Mich., 188 U. S. 505 (1903); Ballard *v.* Hunter, 204 U. S. 241 (1907).

This limitation of "due process" extends to all acts of the State, legislative, judicial, or executive.

C. B. & Q. R. R. *v.* Chicago, 166 U. S. 226 (1898); Scott *v.* McNeal, 154 U. S. 34 (1894).

It is regulated by the laws of the State.

Walker *v.* Sauvient, 92 U. S. 90 (1875).

But a State cannot make "due process" anything it likes. Laws must operate on all alike, and must not subject any citizen or his property to an arbitrary exercise of governmental power.

Stuart *v.* Palmer, 74 N. Y. 183, 30 Am. Rep. 289 (1878); Giozza *v.* Tiernan, 148 U. S. 657 (1892); Pacific Gas Imp. Co. *v.* Ellert, 64 Fed. 421 (1894).

The legislation must not be hostile, arbitrary, or partial.

Mo. Pac. Ry. *v.* Humes, 115 U. S. 512 (1885); Dent *v.* West Va., 129 U. S. 114 (1889).

The property rights, so protected, include business, occupation, profession, and all forms of property.

Slaughter House Cases, 16 Wall. 36 (1872); Greenwood *v.* Union F. R. Co., 105 U. S. 13 (1881); Head *v.* Amoskeag Mfg. Co., 113 U. S. 9 (1885); Eldridge *v.* Trezevant, 160 U. S. 452 (1896); Strickley *v.* Highland B. G. Mining Co., 200 U. S. 527 (1906).

But in this connection the Supreme Court has not made a general definition of property.

Scranton *v.* Wheeler, 179 U. S. 141 (1900).

This constitutional provision does not prevent the State laying extra burdens on property, such as:

Electrical companies paying salaries of state commissioners.

N. Y. *ex rel.* N. Y. Electric Lines Co. *v.* Squire, 145 U. S. 175 (1892).

Compelling gas company to change gas mains.

New Orleans Gas Light Co. *v.* Drainage Commission, 197 U. S. 453 (1905).

Rebuilding a railway bridge, and making the company bear the entire cost:

C. B. & Q. R. R. *v.* Ill., 200 U. S. 561 (1906); C. I. & W. Ry. *v.* City of Connersville, 218 U. S. 336 (1910).

Changing street railway tunnel.

West Chicago St. Ry. *v.* Ill., 201 U. S. 506 (1906).

Compelling railway companies to make track connections with intersecting lines.

Wisconsin, M. & P. Ry. Co. *v.* Jacobson, 179 U. S. 287 (1900).

Property can also be taken for public use, and public improvements can be commanded.

Barron *v.* Mayor of Baltimore, 7 Peters 243 (1833); Garrison *v.* N. Y. City, 88 U. S. 196 (1874); Nickerson *v.* Boston, 131 Mass. 306 (1881); Wurtz *v.* Hoagland, 114 U. S. 606 (1885); Carthage *v.* Fredrick, 122 N. Y. 268, 25 N. E. 480 (1890); Lent *v.* Tillson, 140 U. S. 316 (1891); Fall Brook Irrig. Co. *v.* Bradley, 164 U. S. 112 (1896); *In re* Tuthill, 163 N. Y. 133 (1900); Lathrop *v.* Racine, 119 Wis. 461, 97 N. W. 492 (1903).

But where property is taken for public improvements, the owner must be compensated; and the state cannot act summarily in the laying of special burdens upon property.

In re Madera Irrig. Dist., 92 Cal. 296 (1891); Murdock *v.* Cincinnati, 44 Fed. 726 (1891); Paulsen *v.* Portland, 149 U. S. 30 (1893); Goodrich *v.* Detroit, 184 U. S. 432 (1902).

This constitutional inhibition does not destroy the right to regulate property, and lay upon it certain liabilities.

Richmond, etc. Ry. Co. *v.* Richmond, 96 U. S. 521 (1877); Fairchild *v.* Rich, 68 Vt. 202, 34 Atl. 692 (1896); Gladson *v.* Minnesota, 166 U. S. 427 (1897); N. Y., etc. R. R. Co. *v.* N. Y., 165 U. S. 628 (1897); Townsend *v.* State, 147 Ind. 624, 47 N. E. 19 (1897); Ohio Oil Co. *v.* Ind., 177 U. S. 190 (1900).

So it can pass sanitary regulations.

Manhattan Mfg. & Fert. Co. *v.* Van Keuren, 23 N. J. Eq. 251 (1872); Baldwin *v.* Smith, 82 Ill. 162 (1876); Fisher *v.* St. Louis, 194 U. S. 361 (1904).

For further cases under police power see next list below.

The courts make a distinction between damaging and taking property. The owner is not entitled to compensation whenever damages do not amount to a taking.

Transportation Co. *v.* Chicago, 99 U. S. 635 (1878); U. S. *v.* Alexander, 148 U. S. 186 (1893); Gibson *v.* U. S., 166 U. S. 269 (1897); Scranton *v.* Wheeler, 179 U. S. 141 (1900); Union Bridge Co. *v.* U. S., 204 U. S. 364 (1907).

Private property can be taken for public use, but the owner must be compensated. The State must stop short of uncompensated taking of private property, no matter what the police powers may be.

Ten Eyck *v.* Del. & R. Canal, 37 Am. Dec. 233 (1841); Reed *v.* Wright, 2 G. Greene (Ia.) 15 (1849); Dingley *v.* Boston, 100 Mass. 544 (1868); Kean *v.* Driggs Drainage Co., 45 N. J. L. 91 (1883); Campbell *v.* Holt, 115 U. S. 620 (1885); Lloyd *v.* Wayne Circuit Judge, 56 Mich. 236, 23 N. W. 28 (1885); Arrowsmith *v.* Harmoning, 118 U. S. 194 (1886); People *v.* O'Brien, 111 N. Y. 1, 18 N. E. 692 (1888); People *v.* Ryder, 12 N. Y. S. 48 (1890); Marchant *v.* Penn. Ry. Co., 153 U. S. 380 (1894); Barr *v.* New Brunswick, 67 Fed. 402 (1895); Davis *v.* St. Louis Co. Commrs., 65 Minn. 310, 67 N. W. 997 (1896); Eldridge *v.* Trezevant, 160 U. S. 452 (1896); Mo. Pac. Ry. Co. *v.* Nebraska, 164 U. S. 403 (1896); Priewe *v.* Wis., etc. Co., 93 Wis. 534, 67 N. W. 918 (1896); Phillips *v.* Postal Tel. Cable Co., 131 N. C. 225, 42 S. E. 587 (1902).

This protection does not extend to property used for illegal purposes.

Greene *v.* James, Fed. Cases No. 5766 (1854); Boston Beer Co. *v.* Mass., 97 U. S. 25 (1877).

Property can be taken for taxation.

Kirtland *v.* Hotchkiss, 100 U. S. 491 (1879); N. O. & T. P. Ry. *v.* Kent, 115 U. S. 321 (1885); Travellers' Ins. Co. *v.* State, 185 U. S. 364 (1902).

But there are certain restrictions even to taxing power.

Town of Guilford *v.* Cornell, 18 Barber (N. Y.) 615 (1854); Philadelphia Ass'n., etc. *v.* Wood, 39 Pa. St. 73 (1861); Board of Directors, etc. *v.* Houston, 71 Ill. 318 (1874); R. R. Tax Cases, 13 Fed. 722 (1882); City of Louisville *v.* Cochran, 82 Ky. 15 (1884); Scharf *v.* Tasker, 73 Md. 378, 21 Atl. 56 (1891); Meyer *v.* Shields, 61 Fed. 713 (1894); State *v.* Hamlin, 86 Me. 495, 30 Atl. 76 (1894); Newton *v.* Raper, 150 Ind. 630, 50 N. E. 749 (1898); Alexander *v.* Gordon, 101 Fed. 91 (1900); Gallup *v.* Schmidt, 183 U. S. 300 (1902).

IV. *Cases Illustrating the Expanding "Police Power" over the Control of Business and Property, through the Regulation of Trades, Occupations, Real Property, and Personal Property.*

(1) What is police power?

Prigg *v.* Penn., 16 Peters 539 (1842); Pierce *v.* N. H., 5 How. 583 (1846); Alger's Case, 7 Cush. (Mass.) 53 (1851); Slaughter House Cases, 16 Wall. 36 (1872); People *v.* Cipperly, 101 N. Y. 631 (1879); Tenn. *v.* Davis, 100 U. S. 300 (1879); Kidd *v.* Pearson, 128 U. S. 26 (1887); Lawton *v.* Steele, 152 U. S. 133 (1893); Lake S. etc. R. R. *v.* Ohio, 173 U. S. 285 (1898); Bonnett *v.* Vallier, 136 Wis. 193, 116 N. W. 885 (1908); Williams *v.* State, 85 Ark. 464, 108 S. W. 838 (1908); People *v.* Luhrs, 195 N. Y. 377 (1909); State *v.* Mayo, 75 Atl. (Me.) 295 (1909).

Police powers and constitutional limitations.

Hubbard *v.* Taunton, 140 Mass. 467 (1886); Danforth *v.* Groton Water Co., 178 Mass. 472 (1901); Martin *v.* D. C., 205 U. S. 135 (1907); State Bank *v.* Haskell, 219 U. S. 104 (1911).

It embraces the right to regulate, within certain limits:

Business, trade, and occupation.

Austin *v.* State, 10 Mo. 591 (1847); Beebe *v.* State, 6 Ind. 501 (1855); Slaughter House Cases, 16 Wall. 106 (1872); Munn *v.* People, 69 Ill. 80 (1873); *In re* Jacobs, 98 N. Y. 98 (1885); People *v.* Moorman, 86 Mich. 434 (1891); People *v.* Warden of City Prison, 144 N. Y. 529 (1895); State *v.* McMahon, 65 Minn. 434 (1896); *In re* Considine, 83 Fed. 157 (1897); City of Richmond *v.* Southern Bell T. & T. Co., 85 Fed. 19 (1898); Ferner *v.* State, 151 Ind. 247 (1898); Nutting *v.* Commonwealth of Mass., 183 U. S. 553 (1902); Lemieux *v.* Young, 211 U. S. 489 (1909); Weed *v.* Bergh, 141 Wis. 569, 124 N. W. 664 (1910); Williams *v.* Arkansas, 217 U. S. 79 (1910).

And the sale of merchandise, meat, milk, etc.

In re Barber, 39 Fed. 641 (1889); Brinner v. Rebman, 138 U. S. 78 (1890); Stolz *v.* Thompson, 44 Minn. 271, 46 N. W. 410 (1890); Patapsco Guano Co. *v.* Board of Ag., 52 Fed. 690 (1892); Williams *v.* Standard Oil Co. of Minn., 50 Minn. 290 (1892); *In re* Mosler, 8 Ohio C. C. 324 (1894); People *v.* Webster, 40 N. Y. S. 1135 (1896); Armour Packing Co. *v.* Snyder, 84 Fed. 136 (1897); *In re* Paulis, 144 Fed. 472 (1906); F. L. Fisher Co. *v.* Woods, 187 N. Y. 90, 79 N. E. 836 (1907); North A. Cold St. Co. *v.* Chicago, 151 Fed. 120 (1907); Kidd Dater & P. Co. *v.* Musselman Groc. Co., 217 U. S. 416 (1910); McDermott *v.* State, 143 Wis. 18, 126 N. W. 888 (1910); Nelson *v.* Minneapolis, 127 N. W. 445 (1910).

It extends to fixing of prices and charges.

Munn *v.* Ill., 94 U. S. 113 (1876); Spring Valley Water Works *v.* Schottler, 110 U. S. 347 (1884); Peik *v.* Chicago & N. W. R. R., 94 U. S. 164 (1876). (See further list pertaining to R. R. Rates, below).

What is a reasonable regulation?

Commonwealth *v.* Gage, 114 Mass. 328 (1873); Hurtado *v.* Cal., 110 U. S. 516 (1883); Yick Wo *v.* Hopkins, 118 U. S. 356 (1885); People *v.* Budd, 117 N. Y. 1 (1889) and Budd *v.* People, 143 U. S. 517 (1892); Brass *v.* N. Dakota, 153 U. S. 391 (1894); Cotting *v.* Kansas Stockyards Co., 79 Fed. 679 (1897); Smyth *v.* Ames, 169 U. S. 466 (1898).

(2) The police power includes the right to regulate certain phases of the labour contract.

Weighing coal to ascertain miners' wages.

Millett *v.* People, 117 Ill. 294, 7 N. E. 631 (1886); Peel Splint Coal Co. *v.* State, 36 W. Va. 802, 15 S. E. 1000 (1892); Ramsay *v.* People, 142 Ill. 380, 37 N. E. 364 (1892); *In re* House Bill No. 203, 21 Colo. 27, 39 Pac. 431 (1895); McLean *v.* State, 98 S. W. (Ark.) 729 (1906).

Regulating time of payment of wages.

State *v.* Brown & Sharpe Mfg. Co., 18 R. I. 16 (1842); Braceville Coal Co. *v.* People, 147 Ill. 66 (1893) (*contra*); Lawrence *v.* Rutland R. R. Co., 80 Vt. 370, 67 Atl. 1091 (1907); N. Y. C. & H. R. R. Co. *v.* Williams, 118 N. Y. S. 785 (1909); Arkansas Stave Co. *v.* State, 94 Ark. 27, 125 S. W. 1001 (1910).

Company's stores, (anti-truck laws at first were almost invariably held unconstitutional).

Godcharles *v.* Wigeman, 113 Pa. St. 431 (1886); Hancock *v.* Yaden, 121 Ind. 366 (1889); State *v.* Coal & Coke Co., 33

W. Va. 188 (1889); Frorer v. People, 141 Ill. 171, 31 N. E. 395 (1892); State *v.* Peel Splint Coal Co., 36 W. Va. 802 (1892); State *v.* Loomis, 20 S. W. (Mo.) 332 (1892).

Deductions from wages on account of fines, etc.

Commonwealth *v.* Perry, 155 Mass. 117 (1891); Birdsell *v.* Twenty-third St. Ry. Co., 8 Daly (N. Y.) 419 (1880).

The wage-earners' lien (at first held unconstitutional because of special legislation.)

Warren *v.* Sohn, 112 Ind. 213 (1887); Ripley *v.* Evans, 87 Mich. 217 (1891); Waters *v.* Wolf, 162 Pa. St. 153 (1894); Palmer *v.* Tingle, 55 Ohio St. 423 (1896).

Regulating hours of labour.

Lusk v. Hotchkiss, 37 Conn. 219 (1870); McCarthy *v.* Mayor of N. Y., 96 N. Y. 1 (1884); Bartlett *v.* St. Ry. Co., 82 Mich. 658 (1890); People *v.* Phyfe, 136 N. Y. 554 (1893); Low *v.* Rees Printing Co., 41 Neb. 127 (1894); *In re* Eight Hour Law, 21 Colo. 29 (1895); Holden *v.* Hardy, 169 U. S. 366 (1898).

On public works.

U. S. *v.* Martin, 94 U. S. 400 (1876); People *v.* Warren, 34 N. Y. Sup. 942 (1895); Byars *v.* State, 102 Pac. (Okla.) 804 (1909); *ex parte* Kuback, 85 Cal. 274 (1890).

Hours of women and children.

Commonwealth *v.* Hamilton Mfg. Co. 120 Mass. 383 (1876).

People *v.* Ewer, 141 N. Y. 129 (1894); Ritchie *v.* People, 155 Ill. 98 (1895) (*contra*); W. C. Ritchie & Co. *v.* Wayman 144 Ill. 509 (1910) (*accord*); Inland Steel Co. *v.* Yedinat, 172 Ind. 423; 87 N. E. 229 (1909).

Employer's liability for damages. "Fellow servant" rule.

Johnson *v.* Phil. & R. Ry. Co., 163 Pa. St. 127 (1894); Miller *v.* C. B. & Q. R. R., 65 Fed. 305 (1894); Pittsburg C. C. & St. L. Ry. Co. *v.* Montgomery, 152 Ind. 1 (1898); C. M. & St. P. Ry. Co. *v.* Westby, 178 Fed. 619 (1910); Kelly *v.* C. M. & St. P. Ry. Co., 142 Wis. 154, 125 N. W. 464 (1910); M. J. & K. C. Ry. Co. *v.* Turnipseed, 219 U. S. 35 (1910); S. L. & S. F. Ry. Co. *v.* Armes, 136 S. W. (Tex.) 1164 (1911).

(3) Police power includes power:

To inspect workshops and factories, mines, etc., and order changes, to a certain extent.

Daniels *v.* Hilgard, 77 Ill. 640 (1875); *In re* Jacobs, 98 N. Y. 98 (1885); Durkin *v.* Kingston Coal Co., 171 Pa. St. 193 (1895); People *v.* Smith, 108 Mich. 527 (1896); Borgnis *v.* Falk, 147 Wis. 327 (1911).

To prohibit certain occupations, *e. g.* gambling, liquor selling.

Bartemeyer *v.* Iowa, 18 Wall. 129 (1873); State *v.* Mugler, 29 Kan. 252 (1883); *In re* Rohrer, 140 U. S. 545 (1890); Scott *v.* Donald, 165 U. S. 107 (1896); People *v.* Fallon, 152 N. Y. 112 (1897); Vance *v.* Vandercock, 170 U. S. 438 (1897).

"Ticket scalpers."

Fry *v.* State, 63 Ind. 532 (1878); People *v.* Warden City Prison, 157 N. Y. 116 (1898).

Opium, baking powder.

State *v.* Lee, 37 Mo. 143 (1897); Stolz *v.* Thompson, 44 Minn. 271 (1890).

And to limit certain business to definite districts.

Metropolitan Board of Health *v.* Heister, 37 N. Y. 661 (1868); N. Y. Sanitary U. Co. *v.* Dept. Pub. Health, 70 N. Y. S. 510 (1901); City of Crowly *v.* Ellsworth, 114 La. 308; 38 So. 199 (1905).

(4) Through the police power the state regulates property. It prescribes methods of acquiring property and, to some extent, regulates its use.

(4a) Realty. Regulates laws of inheritance. Inheritance tax.

Sturgis *v.* Ewing, 18 Ill. 176 (1856); Strode *v.* Commonwealth, 52 Pa. St. 181 (1866); *In re* McPherson, 104 N. Y. 306 (1887); State *v.* Gorman, 40 Minn. 232 (1889); Curry *v.* Spencer, 61 N. H. 624 (1892); Wunderle *v.* Wunderle, 144 Ill. 40 (1893); U. S. *v.* Perkins, 163 U. S. 625 (1895); Dewey *v.* Des Moines, 173 U. S. 193 (1898); Magoun *v.* Ill. Trust & Savings Bank, 107 U. S. 283 (1898); Ala. & V. Ry. Co. *v.* King, 93 Miss. 379, 47 So. 857 (1908).

The State may regulate buildings. Building laws.

Ex parte Fiske, 72 Cal. 125 (1887); City of Cincinnati *v.* Steinkamp, 54 Ohio St. 284 (1896); *In re* Wilshire, 103 Fed. 620 (1900); Tilford *v.* Belknap, 31 Ky. L. 662, 103 S. W. 289 (1907); Welch *v.* Swasey, 214 U. S. 91 (1909); Same case, 193 Mass. 364 (1907); Claffey *v.* Chicago D. & C. Co., 249 Ill. 210, 94 N. E. 551 (1911).

And tear down buildings and destroy other property if a nuisance.

Fertilizing Co. *v.* Hyde Park, 97 U. S. 659 (1878); Harrington *v.* City of Providence, 20 R. I. 233 (1897); Shea *v.* City of Muncie, 148 Ind. 14 (1897); American Pt. Wks. *v.* Lawrence, 23 N. J. L. 9 (1850); Wadleigh *v.* Gilman *et al.*, 12 Me. 403 (1835).

And can compel certain improvements.

Draining Co. Cases, 11 La. An. 338 (1856); Donnelly *v.* Decker, 58 Wis. 461, 46 Am. Rep. 437 (1883); Turlock Irrigation Dist. *v.* Williams, 76 Cal. 360 (1888); Fall Brook Irrig. Dist. *v.* Bradley, 164 U. S. 112 (1896); Farmers' Ind. Ditch Co. *v.* Ag. D. Co., 22 Colo. 513 (1896); *In re* Central Irrig. Dist., 117 Cal. 382 (1897); Smith *v.* Carlow, 114 Mich. 67 (1897); San Diego L. & T. Co. *v.* Jasper, 89 Fed. 274 (1898); Stanislaus County *v.* J. & K., etc. Co., 192 U. S. 201 (1904).

(4b) Personal property can be destroyed if illegally used.

Lawton *v.* Steele, 119 N. Y. 226 (1890) and 152 U. S. 133; Glennon *v.* Britton, 155 Ill. 232 (1895); Bittenhaus *v.* Johnson, 92 Wis. 588 (1896).

And in the interests of public health.

Loesch *v.* Koehler, 144 Ind. 278 (1895); N. A. Cold Storage Co. *v.* Chicago, 211 U. S. 306 (1908).

Fish and game.

In re Marshall, 102 Fed. 323 (1900); Windsor *v.* State, 103 Md. 611, 64 Atl. 288 (1906); People *v.* Waldorf-Astoria Hotel Co., 103 N. Y. 434 (1907); People *v.* Hesterberg, 211 U. S. 31 (1908).

Destroy diseased trees.

State *v.* Main, 69 Conn. 123 (1897).

Regulate domestic animals.

Wilcox *v.* Hemming, 58 Wis. 144 (1883); Jones *v.* Brim, 165 U. S. 180 (1897); Sentell *v.* N. O. & C. Ry., 166 U. S. 698 (1897); People *v.* Gillespie, 48 N. Y. 882 (1898); Ross *v.* Desha Levee Board, 83 Ark. 176; 103 S. W. 380 (1907).

Regulate moving picture shows.

Block *v.* Chicago, 239 Ill. 251; 87 N. E. 1011 (1909).

(5) The state regulation of corporations, through the exercise of the police power.

The inviolability of the corporate charter.

Dartmouth College *v.* Woodward, 4 Wheat. 518 (1819); Piqua Bank *v.* Kroop, 16 How. 369 (1853); The Binghamton Bridge Case, 3 Wall. 51 (1865).

And the power of state to amend charter.

Holyoke Co. *v.* Lyman, 15 Wall. 500 (1872); Hamilton Gas Light & Coke Co. *v.* Hamilton, 146 U. S. 258 (1892); Bissell *v.* Heath, 98 Mich. 472 (1894); So. Pac. Ry. Co. *v.* B'd. R. R. Commissioners, 78 Fed. 236 (1896); (for further cases upon this point see next section.)

The general police powers over corporations.

Child *v.* Coffin, 17 Mass. 64 (1820); Thorpe *v.* Rutland, etc. R. R., 27 Vt. 140 (1854); Commonwealth *v.* Farmers' & Mechan. Bank, 38 Mass. 542 (1839); People *v.* Commissioners, 59 N. Y. 92 (1874); Beer Co. *v.* Mass., 97 U. S. 25 (1877); Stone *v.* Miss., 101 U. S. 814 (1879); Ward *v.* Farwell, 97 Ill. 593 (1881); Butchers, etc. Co. *v.* Crescent City, etc. Co., 111 U. S. 746 (1883); C. B. & Q. R. R. *v.* Neb., 170 U. S. 57 (1898); St. Marys, etc. Co. *v.* W. Va., 203 U. S. 183 (1906); Roeder *v.* Robertson, 202 Mo. 522, 100 S. W. 1086 (1907); Western Union Tel. Co. *v.* Conn. Mil. Co., 218 U. S. 406 (1910).

Regulation of rates and prices.

Munn *v.* Ill., 94 U. S. 113 (1876); Milwaukee Elec. Ry. & Light Co. *v.* Milwaukee, 87 Fed. 577 (1898); Interstate Consol. St. Ry. Co. *v.* Mass., 207 U. S. 79 (1907).

Water works.

Spring Valley Water Works *v.* Schottler, 110 U. S. 347 (1884); Santa Anna Water Co. *v.* Town of Santa Barbara, 56 Fed. 339 (1893); Rogers Park Water Co. *v.* Fergus, 180 U. S. 624 (1901).

Gas and electric light.

New Orleans Gas Co. *v.* Louisiana Light, etc. Co., 115 U. S. 650 (1885); Cleveland Gas Light & Coke Co. *v.* City of Cleveland, 71 Fed. 610 (1896); Milwaukee Elec. Ry. & Light Co. *v.* Milwaukee, 87 Fed. 577 (1898); Consolidated Gas Co. *v.* Mayer, 146 Fed. 150 (1906).

Telephone.

Home T. & T. Co. *v.* Los Angeles, 211 U. S. 265 (1908).

Irrigation.

San Joaquin & King R., etc. Co. *v.* Stanislaus Co., 90 Fed. 516 (1898).

(6) Regulation of railroads.

Richmond F. & P. R. R. Co. *v.* City of Richmond, 96 U. S. 521 (1877); Charlotte C. & A. Ry. *v.* Gibbes, 142 U. S. 382 (1892); Minneapolis & St. P. Ry. Co. *v.* Emmons, 149 U. S. 364 (1893).

Must fence the tracks.

Shepherd *v.* Buffalo N. Y. & E. R. R. Co., 35 N. Y. 641 (1866); Sawyer *v.* Vt., etc. Ry. Co., 105 Mass. 196 (1870).

And care for animals shipped.

B. & O. R. R. *v.* U. S., 220 U. S. 94 (1911).

Can be made liable for double damages done.

Treadway *v.* C. S. & St. P. R. R. Co., 43 Ia. 527 (1876); Cairo, etc. R. R. Co. *v.* People, 92 Ill. 97, 34 Am. Rep. 12

(1879); Jensen *v.* S. D. Cent. Ry., 25 S. D. 506; 127 N. W. 650 (1910).

Responsible for fires from locomotives.

B. & O. Ry. Co. *v.* Tripp, 175 Ill. 251 (1898).

Regulate grade crossings.

Pittsburgh & Connelsville R. R. Co. *v.* S. W. P. Ry. Co., 77 Pa. St. 173 (1874); People *v.* B. & O. R. R. Co., 70 N. Y. 569 (1877); Wabash Ry. Co. *v.* Defiance, 167 U. S. 88 (1897).

And speed.

Mobile, etc. R. R. *v.* State, 51 Miss. 137 (1875); Haas *v.* C. & N. W. R. R. Co., 41 Wis. 44 (1876); Erb *v.* Morasch, 8 Kan. App. 61; 54 Pac. 323 (1898).

And the employment of engineers, etc.,

Nashville C. & St. L. Ry. Co. *v.* Alabama, 128 U. S. 96 (1888); C. R. I. & P. Ry. Co. *v.* State, 86 Ark. 412 (1908) and 219 U. S. 453 (1911).

The regulation of railway rates.

Chicago, Burlington & Quincy R. R. *v.* Iowa, 94 U. S. 155 (1876); Dillon *v.* Erie Ry., 43 N. Y. 320 (1897); Smyth *v.* Ames, 169 U. S. 466 (1898); L. S. & M. S. Ry. *v.* Smith, 173 U. S. 684 (1899); L. & N. Ry. *v.* Kent, 183 U. S. 503 (1902); Minneapolis & St. P. Ry. Co. *v.* Minn., 186 U. S. 257 (1902); U. S. *v.* Standard Oil Co. of Ind., 155 Fed. 305 (1907); Cent. R. R. of Ga. *v.* R. R. Commrs. of Ala., 161 Fed. 925 (1908); *Ex parte* Young, 209 U. S. 123 (1908); U. S. *v.* Vacuum Oil Co., 158 Fed. 536 (1908); McGrew *v.* Mo. Pac. Ry., 230 Mo. 496, 132 S. W. 1076 (1910); Shepherd *v.* No. Pac. Ry., 184 Fed. 765 (1911).

General railway regulations.

Pullman Co. *v.* Kansas, 216 U. S. 56 (1910); Western Union Tel. Co. *v.* Kansas, 216 U. S. 1 (1910).

Headlights, safety appliances, etc.

Atlantic Coast Line Ry. *v.* North Cov. Corporation Comm., 206 U. S. (1907); Smeltzer *v.* St. L. S. F. Ry. Co., 158 Fed. 649 (1908); McCully *v.* C. B. & Q. Ry. Co., 212 Mo. 1, 110 S. W. 711 (1908); King Lumber, etc. Co. *v.* Atlantic Coast Line Ry. Co., 58 Fla. 292, 50 So. 509 (1909); Oregon R. & Nav. Co. *v.* Campbell, 173 Fed. 957 (1909); Atlantic Coast Line Ry. *v.* State, 69 S. E. (Ga.) 725 (1910); C. I. & L. Ry. Co. *v.* Ry. Commiss., 173 Ind. 469, 90 N. E. 1011 (1910); Gt. No. Ry. *v.* Minn., 216 U. S. 206 (1910); Morgan's L. & T., etc. Co. *v.* R. R. Commiss. of La., 53 So. 890 (1910); Schlemmer *v.* B. R. & P. Ry. Co., 205 U. S. 1 (1906); State *v.* Mo. Pac. Ry. Co., 81 Neb. 15 (1908) and 217 U. S. 205 (1910); Atlantic Coast Line Ry. Co. *v.* Riverside Mills, 219 U. S. 186 (1911); C. B. & Q. Ry. Co. *v.* U. S., 220 U. S., 559 (1911).

The "Commodities Clause", Hepburn Act.

U. S. *v.* D. & H. R. Ry. Co., 164 Fed. 215 (1908); U. S. *v.* D. & H. Co., 213 U. S. 366 (1909).

Power of the Interstate Commerce Commission.

Interstate Commerce Commission *v.* Stickney, 215 U. S. 98 (1909); B. & O. R. R. Co. *v.* Int. St. Com. Commission, 215 U. S. 216 (1909); Interstate Com. Com. *v.* Ill. Cent. Ry. Co., 215 U. S. 452 (1909); Interstate Com. Com. *v.* D. L. & W. Ry. Co., 216 U. S. 531 (1910); Interstate Com. Com. *v.* N. P. Ry. Co., 216 U. S. 538 (1910); Interstate Com. Com. *v.* C. R. I. & P. Ry. Co., 216 U. S. 88 (1910); Southern Pac. Terminal Co. *v.* Interstate Com. Com., 219 U. S. 498 (1911).

The general theory of regulating corporations, illustrated by the laws.

(7) Regulating insurance companies.

Paul *v.* Virginia, 8 Wall., 168 (1868); Orient Ins. Co. *v.* Daggs, 172 U. S. 557 (1869); Riley *v.* Franklin Ins. Co., 43 Wis. 449 (1877); Equitable Life Ins. Co. *v.* Clements, 140 U. S. 226 (1891); People *v.* Formosa, 131 N. Y. 478 (1892); Iowa Life Ins. Co. *v.* East. Mut. L. Ins. Co., 64 N. J. L. 340, 45 Atl. 762 (1900); Montellone *v.* Seaboard, etc. Ins. Co., 52 So. (La.) 1032 (1910); Scottish Union *v.* Wade, 127 S. W. (Tex.) 1186 (1910).

(8) Regulations of combinations in restraint of trade. "Trusts", etc.

People *v.* Chicago Gas Trust Co., 130 Ill. 268 (1889); People *v.* North River Sugar Ref. Co., 121 N. Y. 582 (1890); Mathews *v.* Associated Press, 136 N. Y. 333 (1893); People *v.* Sheldon, 139 N. Y. 251 (1893); Merz Capsule Co. *v.* U. S. Capsule Co., 67 Fed. 414 (1895); National Harrow Co. *v.* Hench, 76 Fed. 667 (1896); Bement *v.* National Harrow Co., 186 U. S. 70 (1902); Beechley *v.* Mulville, 102 Ia. 602 (1897); U. S. *v.* Trans-Mississippi Freight Ass'n., 166 U. S. 290 (1897); U. S. *v.* Joint Traffic Ass'n., 171 U. S. 505 (1898); Harding *v.* American Glucose Co., 182 Ill. 551 (1899); State *v.* Portland Nat. Gas. & Oil Co., 153 Ind. 483, 52 N. E. 1089 (1899).

Department stores.

Knight & Jillson Co. *v.* Miller, 172 Ind. 27, 87 N. E. 823 (1909); State *v.* Standard Oil Co., 218 Mo. 1, 116 S. W. 909 (1909); Commonwealth *v.* International Harvester Co., 115 S. W. (Kent.) 703 (1909); City of Chicago *v.* Netcher, 55 N. E. (Ill.) 707 (1899).

"Corners."

Sampson *v.* Shaw, 101 Mass. 145 (1869); Craft *v.* McConoughy, 79 Ill. 346 (1875); Arnot *v.* Coal Co., 68 N. Y. 558 (1877).

Decision upholding the Pure Food Act.

Hipolite Egg Co. *v.* U. S., 220 U. S. 45 (1911).

V. *Sherman Anti-Trust Act Decisions.*

Note—these do not strictly come under head of police powers, but are placed here to indicate governmental control of corporations.

U. S. *v.* Jellico Mt. Coal Co., 46 Fed. 432 (1891); U. S. *v.* Greenhut *et al.*, 50 Fed. 469 (1892); U. S. *v.* Nelson, 52 Fed. 646 (1892); U. S. *v.* Trans-Miss. Freight Ass'n., 166 U. S. 290 (1897) (begun in 1892); Workingmen's Amalgamated Council of N. O. *v.* U. S., 54 Fed. 994, and 57 Fed. 85 (1893); U. S. *v.* Alger, 62 Fed. 824 (1894) (Labour "monopoly"); U. S. *v.* E. C. Knight Co., 156 U. S. 1 (1895) (Sugar "trust"); *In re* Debs, 158 U. S. 564 (1895) (Pullman strike and labour monopoly); U. S. *v.* Cassidy, 67 Fed. 698 (1895) (Pullman strike and labour monopoly); Hopkins *v.* U. S., 171 U. S. 578 (1897) (Live stock combine); U. S. *v.* Joint Traffic Ass'n., 171 U. S. 505 (1898); Addyston Pipe & Steel Co. *v.* U. S., 175 U. S. 211 (1899); Lowry *et al. v.* Tile, etc. Ass'n., 106 Fed. 38 (1900); and Montague & Co. *v.* Lowry, 115 Fed. 27 (1902); Union Sewer Pipe Co. *v.* Conelly, 99 Fed. 354 (1900), and 184 U. S. 540 (1902); Chesapeake & Ohio Fuel Co. *v.* U. S., 115 Fed. 610 (1902); Bement *v.* National Harrow Co., 186 U. S. 70 (1902); Northern Securities Co. *v.* U. S., 193 U. S. 197 (1904); Swift & Co. *et al. v.* U. S., 196 U. S. 375 (1905); U. S. *v.* Atchison T. & St. F. Ry. Co., 142 Fed. 176 (1905); Hale *v.* Henkel, 201 U. S. 43 (1906) (Tobacco "trust"); Nelson *v.* U. S., 201 U. S. 92 (1906); General Paper Co. *v.* U. S. 201 U. S. 117 (1906); U. S. *v.* Armour & Co., 142 Fed. 808 (1906); Standard Oil Co. of N. J. *v.* U. S., 173 Fed. 177 (1909); and the Standard Oil Co. *v.* U. S., 221 U. S. 1 (1911); U. S. *v.* American Tobacco Co., 221 U. S. 106 (1911).

Decisions on the new forestry laws.

Adirondack Ry. Co. *v.* People, 175 U. S. 335 (1899); U. S.

v. Grimaud, 220 U. S. 506 (1910); Light *v.* U. S., 220 U. S. 523 (1910).

VI. *List of Cases Illustrating the Development of the Use of Injunctions in Labour Union Matters, against the Boycott, Threats, Conspiracy, etc., also Relating to the Rights of Unions.*

Spinning Co. *v.* Riley, 6 L. R. Equity, 551 (1868); Assurance Co. *v.* Knott, 10 Chancery App. 142 (1874); State *v.* Glidden, 55 Conn. 46, 8 Atl. 890 (1887); Callam *v.* Wilson, 127 U. S. 540 (1887); Sherry *v.* Perkins, 147 Mass. 212 (1888); Thomas *v.* Musical Union, 121 N. Y. 45, 24 N. E. 24 (1890); Casey *v.* Typographical Union, 45 Fed. 135 (1891); Collard *v.* Marshall, 1 Ch. 571 (1892); Coeur d'Alene Con. Min. Co. *v.* Miners Union, 51 Fed. 260 (1892); Worthington *v.* Waring, 157 Mass. 421, 32 N. E. 744 (1892); Murdock Kerr & Co. *v.* Walker *et al.*, 152 Pa. St. 595, 25 Atl. 492 (1893); Blindell *et al. v.* Hagan *et al.*, 54 Fed. 40 & 56 Fed. 696 (1893); Toledo & Ann Arbor Ry. Co. *v.* Pa. Ry. Co., 54 Fed. 746 (1893); Queens Ins. Co. *v.* State, 86 Tex. 250, 24 S. W. 397 (1893); Joy *v.* St. Louis, 138 U. S. 1 (1893); U. S. *v.* Workingmen's Amal. Council of N. O., 54 Fed. 994 (1893); and 57 Fed. 85; Southern Cal. Ry. Co. *v.* Ritterford *et al.*, 62 Fed. 796 (1894); Farmers Loan & Trust Co. *v.* N. P. Ry. Co., 60 Fed. 803 (1894), and 63 Fed. 310; Arthur *v.* Oaks, 63 Fed. 310 (1894); U. S. *v.* Debs, 64 Fed. 724 (1894) and *in re* Debs, 158 U. S. 564 (1895); U. S. *v.* Elliott *et al.*, 62 Fed. 801 (1894), and 64 Fed. 27; U. S. *v.* Alger, 62 Fed. 824 (1894); Thomas *v.* Cincinnati Ry. Co., 62 Fed. 803 (1894); Wick China Co. *v.* Brown *et al.*, 164 Pa. 449 (1894); Barr *et al. v.* Essex Trade Amalgamated Typo. Union, 53 N. J. Eq. 101 (1894); Reynolds *v.* Everett, 144 N. Y. 189, 39 N. E. 72 (1894); Oxley Stave Co. *v.* Coopers Union, 72 Fed. 659 (1895); Elder *et al. v.* Whitesides *et al.*, 72 Fed. 724 (1895); Hamilton Brown Shoe Co. *v.* Saxey, 131 Mo. 212 (1895); Davis *v.* Zimmerman, 36 N. Y. Sup. 303 (1895); Vegelhan *v.* Guntner *et al.*, 167 Mass. 92, 44 N. E.

1077 (1896); Consolidated Steel, etc. Co. *v.* Murray, 80 Fed. 811 (1897); Nashville, etc. Ry. Co. *v.* McConnell, 82 Fed. 65 (1897); Mackall *v.* Ratchford, 82 Fed. 41 (1897); Hopkins *et al. v.* Oxley Stave Co., 83 Fed. 912 (1897); American Steel & Wire Co. *v.* Wire D. & D. M. Union, 90 Fed. 598 (1898); Beck *v.* Railway Teamsters Union, 118 Mich. 497, 77 N. W. 13 (1898); U. S. *v.* Sweeney, 95 Fed. 434 (1899); Otis Steel Co. *v.* Local Union, 110 Fed. 698 (1901); Southern Ry. Co. *v.* Machinists Local Union, 111 Fed. 49 (1901); Reinecke Coal Min. Co. *v.* Wood, 112 Fed. 477 (1901); U. S. *v.* Webber, 114 Fed. 950 (1902); U. S. *v.* Hoggerty, 116 Fed. 510 (1902); *Ex parte* Richards, 117 Fed. 658 (1902); U. P. Ry. Co. *v.* Ruef, 120 Fed. 102 (1902); Wabash Ry. Co. *v.* Haunahan, 121 Fed. 563 (1903); Knudson *v.* Benn, 123 Fed. 636 (1903); Atchison T. & S. F. Ry. Co. *v.* Gee, 139 Fed. 582 (1905); Jensen *v.* Cook & Waiters Union, 39 Wash. 531, 81 Pac. 1069 (1905); Searle Mfg. Co. *v.* Terry, 106 N. Y. S. 438 (1905); Loewe *v.* Cal. St. Federation, 139 Fed. 71 (1905); Employers Teaming Co. *v.* Teamsters Council, 141 Fed. 679 (1905); Seattle Brewing Co. *v.* Hansen, 144 Fed. 1011 (1905); Butterick Pub. Co. *v.* Typographical Union, 100 N. Y. S. 292 (1906); Allis Chalmers Co. *v.* Iron M. Union, 150 Fed. 155 (1906); Enterprise Foundry Co. *v.* Iron Moulders Union, 149 Mich. 31, 112 N. W. 685 (1907); N. Y. C. & I. W. Co. *v.* Brennan, 105 N. Y. Sup. 865 (1907); Rocky Mt. Bell Tel. Co. *v.* Mont. Fed. Lab., 156 Fed. 809 (1907); Shine *v.* Fox Bros. Mfg. Co., 156 Fed. 357 (1907); Sailors Union *v.* H. Lumber Co., 156 Fed. 450 (1907); Delaware L. & W. Ry. Co. *v.* Sailors Union, 158 Fed. 541 (1907); Vilter Mfg. Co. *v.* Humphrey, 112 N. W. (Wis.) 1095 (1907); Russell & Sons *v.* Stampers Union, 107 N. Y. S. 303 (1907); Barnes & Co. *v.* C. Typo. Union, 232 Ill. 424, 83 N. E. 940 (1908); Affirmed, 134 Ill. App. 20; Wilson *v.* Hey, 232 Ill. 389 (1908); Goldfield G. M. Co. *v.* G. M. Union, 159 Fed. 500 (1908); Lindsay & Co. *v.* Montana Fed. of Labor, 96 Pac. 127 (1908); Crescent Feather Co. *v.* Union, 95 Pac. (Cal.), 871 (1908); Reynolds *v.* Davis, 198

Mass. 294 (1908); Jones *v.* E. Van Winkle Gin & M. Wks., 131 Ga. 336, 62 S. E. 236 (1908); Willcutt & Sons Co. *v.* Bricklayers Union, 200 Mass. 110, 85 N. E. 897 (1908); Parkinson & Co. *v.* Building Trades Council, 155 Cal. 508, 58 Pac. 1027 (1908); National Fireproofing Co. *v.* Mason Builders Ass'n, 169 Fed. 259 (1909); Hitcheron Coal & Coke Co. *v.* Mitchell, 172 Fed. 963 (1909); *in re* McCormick, 132 N. Y. App. Div. 921 (1909), 90 N. E. 161; American Federation of Labor *v.* Bucks Stove Range Co., 33 App. D. C. 83 (1909); Jones *v.* Mahler, 116 N. Y. S. 180 (1908), and 125 N. Y. S. 1126 (1910); Schlang *v.* Ladies Waistmakers Union, 124 N. Y. S. 289 (1910); Schwartz *v.* International Ladies Garment Workers, 124 N. Y. S. 968 (1910); Folsom *v.* Lewis, 208 Mass. 336, 94 N. E. 316 (1911); Jones Glass Co. *v.* Glass Bottle Blowers Ass'n, 77 N. J. Eq. 219 (1911); Newton Co. *v.* Erickson, 126 N. Y. S. 949 (1911); Purvis *v.* Local Union, 214 Pa. St. 348, 63 Atl. 58 (1906); Hawarden *v.* Y. & L. C. Co., 111 Wis. 545, 87 N. W. 472 (1901).

VII. *Note on the Dartmouth College Case and its Subsequent Modifications.*

There may be said to be the following stages in the "development" of the law of the inviolability of public charters and franchises, as laid down in the Dartmouth College Case.

1. The case (Dartmouth College *v.* Woodward, 4 Wheat. 518) was decided in 1819. It held that a charter or franchise granted by the State (Crown) to the trustees of Dartmouth College was a *contract* under the meaning of the constitutional inhibition, which prohibits a State from "impairing the obligations of contract".

Resting on this decision, the court subsequently held all public franchises, including railroad and banking

charters, to be contracts between the State that granted them and the corporations so endowed.

2. The Charles River Bridge Case, 11 Peters, 420 (1837) was a recession from this extreme doctrine, and sanctioned the giving of a charter to a competing company.

3. After the Civil War, when the current for a strong central authority was quickened, the Binghamton Bridge Case (3 Wall. 51) was decided (1865) and went back to virtually the ground occupied by the Dartmouth College Case.

4. Within a few years, a reaction came over the country. The Granger Cases came out of the West (1872), and the court greatly expanded the "police powers", giving, thereby, the States a wide domain of regulation over the corporations.

These regulations are limited by the court to "reasonable regulations", and there is a wide variance in the decisions as to what is a "reasonable" regulation. See the following cases:

Munn *v.* Ill., 94 U. S. 113 (1876); C. B. & Q. R. R. *v.* Iowa, 94 U. S. 155 (1876); Peik *v.* C. & N. W. R. R., 94 U. S. 164 (1876); Stone *v.* Wis., 94 U. S. 181 (1876); Ruggles *v.* Ill., 108 U. S. 526 (1883); Railroad Commission Cases, 116 U. S. 307 *et seqq.* (1886).

See also:

Budd *v.* N. Y., 143 U. S. 517 (1892); Michigan Rate Cases, 143 U. S. 339 (1892); Brass *v.* N. D., 153 U. S. 391 (1894).

The Railway Rate Cases are not based entirely on the police powers of the State. The federal railway regu-

lations are based on the clause of the Constitution giving Congress the power to regulate interstate commerce.

A good history of the Dartmouth College Case is Shirley, *The Dartmouth College Causes* (St. Louis, 1879).

Also see "Status and Tendencies of Dartmouth College Case." by Alfred Russell, *American Law Review*, Vol. XXX. p. 321 (1896).

APPENDIX V

List of Authors and Works Cited

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As stated in the Preface, it has not been attempted to present anything like full bibliographies. It would be easy to fill a large volume with lists of books, for the fields covered are many and large. Even without an attempt at a full bibliography, titles could have been multiplied with ease. It is not believed that any useful purpose is accomplished by such multiplication. Books and articles are referred to for some special reason, as sources, as authority, and as affording information which some class of readers may care to have. An endeavour, therefore, has been made to mention and locate all authors and works cited in these volumes.

In the case of general references, as, for example, to the views of William Marshall and Arthur Young or where in addition to specific references a general reference is given, as, for example, the doctrines of Ricardo, those works are mentioned in which these views and doctrines will be found. No effort has been made to cite all editions, but where two or more different editions have been mentioned there is some special reason for so doing. One reason is that in some cases the different editions throw light upon the influence of the author cited. Locke's works serve as an illustration, also La

Mare's *Traité de la Police*. It is frequently significant that an early work appeared in several different places. Occasionally a more recent edition is given in this list than that referred to in the book itself. From table of contents and indices of the later edition the corresponding pages can generally be found. Where it is desired to trace an exact quotation one must use the same edition cited in the text and notes. Where the author uses more than one edition, the aim has been to mention both.

Where the author has himself used rare books, as for example, the first English edition of Hobbes' *Leviathan*, an endeavour has been made to mention also a more accessible and, if possible, an inexpensive edition; but there are many omissions of good and popular editions.

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